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THE BENCH AND THE BAR IN ENGLAND.

To the Editor of the Law Reporter:

In the course of a few weeks spent in England last summer, I had the opportunity of seeing something of the courts of justice there, and of the manner in which they do their work. I have here recorded my impressions for the benefit of your readers, thinking that they might be willing to have the graver matters of the law diversified by these lighter sketches. G. S. H.

It has been often remarked, that the striking scenes and objects in England affect more powerfully the mind of an American, than of Englishmen themselves. With them, the sharp edge of impression is worn off by daily contact. *Minuit præsentia famam.* To them the Avon is a sluggish stream flowing through tame meadows, Abbotsford is an inconvenient country-house, Westminster Abbey is a show-place where you pay sixpence to enter, the Thames is but a "silent highway," lords and ladies are no more than men and women, and her gracious majesty herself hardly escapes Byron's disenchanting epithet of "dumpy." But to us, who see that world beyond the deep with the mind's eye, through the "optic glass" of books, long before we discern it with the natural organ, every thing in the land of our fathers wears a hue unborrowed from the sun. "A light that never was on sea or land" hangs over the lordly bulk of the cathedral, the low-roofed country church, clasped and

garlanded by its coeval ivy, the stately hall with its ancestral oaks, the gray castle, and the ruined abbey. An American of any taste or sensibility paces the cloisters of Westminster Abbey, or the quadrangles of Oxford, with an emotion to which his English friend is a comparative stranger, and which he would look upon as little better than provincial rawness.

It is from this natural feeling that every American lawyer marks the day on which he first enters Westminster Hall as an epoch in his life. This venerable room is so identified with the progress of law and legislation in England, that it seems more than any thing else the core of the great English heart, and is of all places the most striking and characteristic, unless its kindred Abbey may dispute the palm with it in impressiveness. Not that it needs "the foreign aid" of association to commend it to the stranger's regards. It is in itself one of the wonders and triumphs of architecture. It is the largest room in Europe unsupported by columns. Composed of four walls and a roof, enclosing a space two hundred and forty feet long, seventy broad, and ninety high, its size, grandeur, and simplicity affect the mind with somewhat of that emotion which is called forth by the sublime in natural scenery.

The various courts of justice in which English law is administered are clustered together in small apartments adjoining this venerable hall; and the hall itself is used as a sort of lounging place for briefless barristers and for consultation by such as have business. A similar apartment near the courts in Paris is called the "hall of the lost footsteps"; a piece of delicate satire at the expense of those who are so foolish as to throw away time and money in lawsuits.

My first visit to the English courts was under the guidance of a valued friend, a member of the bar, whose competent fortune, contented spirit, and sensitive conscience, prevented him from reaching that professional eminence to which his abilities and attainments would otherwise have given him a just claim. On entering the room occupied by the court of queen's bench, my first feeling was that of surprise at the smallness and meanness of the accommodations enjoyed by this powerful tribunal. The apartment was not more than one half as large as that occupied by the supreme court in this city. At one end were the seats occupied by the judges. Below them was

a small open place appropriated to clerks, officers, and attorneys. The barristers, in their gowns and wigs, were ranged in most uncomfortable seats, similar to those in the old court house in Boston, in the form of segments of a circle, with wooden partitions or divisions in front, having a flat top of some six inches in width, on which the luckless reporters took notes with uneasy fingers. The accommodations for the public were of the most meagre description. Give to this picture a general air of mouldiness and dinginess, and illumine it, not with the "gladsome light of jurisprudence" but with the dull rays of a London sun, making its way through windows that seemed to have been long guiltless of soap and water, and you will have the scene as I saw it.

The judges were dressed in robes of scarlet woollen, the cuffs and collars ornamented with strips of pale drab velvet, or plush, which, by a fiction of law, it is to be presumed, were to be taken for ermine. Around the neck was a band of white muslin or cambric, like that formerly worn by clergymen in our country and still retained by those who walk in the old paths. My attention was naturally drawn to the dignified presence and high-toned bearing of Lord Denman, and to the venerable countenance, strongly marked with the lines of thought and study, of Mr. Justice Patteson.

The barristers, when in court, wear gowns; those who hold the rank of queen's counsel, of black silk, the others, of stuff. The wig is common to the bench and the bar. To the gowns there is no objection, but nothing can be more unbecoming than the wig. It conceals the most characteristic and expressive part of the human countenance and so puts out, so to speak, the face itself, that at a short distance, one person can hardly be distinguished from another, under this uncouth appendage.

At the time of my visit the court were listening to a motion for a new trial argued by the attorney-general, Sir John Jervis, and Sir Frederic Thesiger. In manner, the latter had rather the advantage, but the point under discussion was not of importance enough to call forth the whole power of either of these distinguished gentlemen.

The court of common pleas was in session at the same time in an apartment at no great distance from that occupied by the

queen's bench and resembling it in size and appearance. The sergeants at law, whose peculiar domain is in this court, wear gowns of dark blue stuff, and the wig has a bald spot on the crown to represent the coif. The judges were engaged, during the time I was present, in pronouncing judgment upon a motion for a new trial, in a case in which damages had been recovered for breach of promise of marriage. Each of the judges gave his views orally and they were unanimous in refusing the application. Mr. Justice Maule's remarks were the most extended and were characterized by the vigor and sarcastic point for which he is so remarkable.

The court of exchequer was also in session in a room similar to that occupied by the other courts, but nothing of any particular interest was before them. The judges of this court, and also those of the court of common pleas wear a costume like that of their brethren of the queen's bench.

From the court of exchequer we passed into the room occupied by the lord chancellor, which is small in size and unpretending in appearance. The chancellor in a capacious wig and gown of black silk, was listening to an argument with becoming attention. Before him, on a table, were the mace and the bag containing the great seal. Upon these significant and historical emblems I gazed with due reverence. The countenance of the lord chancellor is massive and strongly marked with the lines of thought. It is well known that Lord Cottenham is one of the greatest equity judges that ever sat upon the wool-sack and that men of all parties acknowledge his profound learning and his eminent judicial ability. He devotes himself mainly to his judicial duties and takes no further part in politics than his elevated position necessarily requires.

The vice-chancellor of England, Sir Launcelot Shadwell, was also holding his court at the time, in a small room not far from that of the chancellor. He is a man advanced in years and remarkable for his air of florid good health, which he owes, among other things, as report says, to his daily habit of bathing in the open air, both in winter and summer. Such a practice either finds or makes a vigorous constitution. He was dressed in a black gown and wore a wig.

The English judges, as a body, are remarkable not only for their dignified bearing and intellectual expression, but also for

their air of robust health and constitutional vigor. In this latter point, they have decidedly the advantage of their judicial brethren in America; and the same observation may be extended to the bar; and indeed to the other learned professions, and to all men who make the brain an instrument of toil. In the English courts you see deeper chests, broader shoulders, ruddier cheeks, and whiter teeth than with us. In a "conflict of laws" we need not shun an encounter; but in a conflict of limbs the odds would be in favor of Westminster Hall. The leaders of the profession go through an amount of toil of which hardly any American lawyer would be capable; but then they have more frequent intermissions and breathing-spaces. This superiority of physical condition is owing to that regular exercise in the open air, which an equable climate invites, and that alternation of labor and rest which the greater subdivision of employments allows. So far as the laboring classes are concerned, the advantage is with us, owing mainly to the greater quantity and superior quality of their food.

On a subsequent occasion I had the pleasure of spending two or three hours with Mr. Baron Alderson, at his chambers, while he was engaged in hearing motions. This is a duty assigned to one of the judges who remains in London for that purpose, while his brethren are upon their several circuits. Mr. Baron Alderson is conspicuous among the judges of England, not only for his learning and judicial ability, but also for the extraordinary quickness of his mind and the intuitive sagacity which leads him at once to the vital points of every issue presented to him. On this occasion, these qualities were most signally displayed. The room in which he sat was about as large as that of the private room of the judge of the district court in our own court house, but by no means so nicely furnished or so contenting to the eye in its proportions and general appearance. The parties who had motions to make, remained in the antechamber, and were called in by an officer in attendance in some previously defined order. Mr. Baron Alderson sat behind a small table, and the parties approached so near to him that he might almost have touched them without rising from his seat. Nothing could be more admirable than the manner in which he discharged the duties before him. A few rapid questions, usually anticipating the statements of the

parties, carried him at once to the core of the case, and a few equally rapid suggestions generally led to a result in which both plaintiff and defendant acquiesced; or if an authoritative decision were required, it was made promptly and conclusively. A pleasure analogous to that experienced by the eye in watching the play of some exquisite piece of machinery, was felt by the understanding in observing the easy and effortless skill with which a powerful and practised mind dealt with complicated and ever-varying details, and removed from the path of justice the rubbish of obstructing technicalities. It is certainly no overstatement to say that more business was despatched in two hours on this occasion than would have been done in one of our courts of justice in a whole day. And it is my own decided conviction that much of this advantage in point of despatch was owing to the simplicity of the whole process — to the chair, the table, and the immediate proximity of the parties. We go into a large court house, as a general rule, for such matters; the judge sits at a distance, every thing has a formal and stately air, and however simple the motion may be we can hardly escape making a speech; and then comes a prolonged reply, and then, perhaps, a rejoinder, and then the decision; and thus twenty minutes are consumed in what might have been disposed of in five. The time lost in our country by unprofitable talking, by long speeches, by not stopping when the speaker has come to an end, by using ten words when one only is necessary, by all sorts of amplification, grandiloquence, and repetition, is something fearful and portentous.

There was another trait in the deportment of Baron Alderson which was worthy of all commendation. The parties who came before him on this occasion were of the humblest class of the legal profession, — young attorneys, but more generally attorneys' clerks, and showing by their manner, appearance, and enunciation, the wide space between their lowly sphere and the proud position of a judge; for in England, and in every other country where there is fixed gradation of rank, the lines of demarcation are so broadly drawn that the eye at once detects them. But nothing could exceed the courtesy and amiableness of Baron Alderson's manner. Had the attorney-general been before him, he could not have been treated with more consideration than were these humble subordinates.

There was not a single gesture of impatience, not one hasty word, not one frown of displeasure. It was "mens sine affectu." He who was unsuccessful in his application felt no chafing irritation from the manner which accompanied the adverse decision; nor, on the other hand, was the pleasure of success alloyed by the ungracious roughness with which it had been vouchsafed. Would that all judges, in every part of the world, would comport themselves with the serene forbearance and self-control of this eminent magistrate. Would that some power would cause them to feel in their own persons the wounds which their impatience inflicts upon the young, the timid, the sensitive, and the self-distrustful. Would that they could understand that though justice is always a respectable virtue, it may sometimes be made an unamiable one.

It need not be remarked that the judicial annals of England have, from the earliest recorded period, been adorned with an illustrious succession of great magistrates, and perhaps at no former epoch has the bench been filled with more upright, learned, and able judges than at the present time. In that country, the bench and the bar stand to each other in a perfectly healthy relation. A seat upon the bench is so honorable a position and judicial services are so liberally acknowledged, that the bench is looked upon as the appropriate reward and authentic assurance of the highest professional success. As a general rule, no lawyer ever dreams of declining the honor of a judgeship, unless disabled by ill-health or some physical infirmity. Thus the bench always commands the highest legal ability, and it is not too much to say that for the last hundred years, at least, the judges have at any given moment represented a greater amount of legal authority than could be found in any twelve (now fifteen) of the barristers. Thus the official superiority of the bench has always been enforced by its substantial preponderance in learning and ability, and the bearing of the most despotic leader at nisi prius has been tempered by the reflection that at any moment he might be called upon to exact from others the deference he was now paying to one against whom he had once struggled for verdicts in many a hard-fought field.

The growing disinclination of successful lawyers in our country to accept seats upon the bench is an ominous fact.

There is no security for the proper administration of justice when the bench is overshadowed by the greater weight of learning and ability among the leaders of the bar. No course of policy can be more truly anti-republican than that which makes the office of a judge unworthy the acceptance of the most distinguished lawyers. The only tyranny we have to fear here is the tyranny of the majority, and what protection is there for the rights of the individual assailed by an encroaching legislature or a ruffian press, if the judiciary be not strong either in its own qualifications or in the support of public opinion?

The judges of England are not only learned and upright magistrates, but also accomplished gentlemen, mingling in the choice society which is to be found in London, and taking their fair share in its light as well as grave discussions. Many of them are excellent scholars, crowned in early life with university honors, a thing never forgotten in England. No member of the bar there, for instance, is ignorant that Baron Alderson was not only senior wrangler at Cambridge, but also attained the highest place in classical studies, a double distinction almost without precedent. It was my good fortune to make the acquaintance of several of the judges, and all the high impressions, gathered from the reports and from the voice of general repute, were amply confirmed upon nearer view. Upon this subject it would be unbecoming to enlarge, but I may be permitted to say that I recall with peculiar sensibility the genial candor, the mild dignity, the winning simplicity, and the cordial frankness of Baron Rolfe. At the present time, the bar is not supposed to comprise a great amount of ability. It contains a large number of barristers eminently respectable and highly accomplished, but few of those legal lights whose superiority no one dreams of disputing. It numbers no one who has succeeded to the splendid eloquence and consummate judgment of Erskine, the unrivalled tact and intuitive sagacity of Scarlett, the vigorous declamation and blistering sarcasm of Brougham, or the eminent legal ability of Sir William Follett.

As is well known to all persons acquainted with the administration of the law in England, the judges pass a portion of each year upon their circuits, accompanied by most of the barristers, all of whom attach themselves to some one of these

circuits. The territory of England is divided into six circuits — the Home, Midland, Norfolk, Oxford, Western, and Northern, to each of which two judges are assigned; and there are separate commissions addressed to a single judge, for North Wales, South Wales, and the city and county of Chester. Of these, the northern circuit, embracing the counties of Yorkshire, Dunham, Northumberland, and Lancashire, is the most important from the amount of business done, and usually attracts the most aspiring and ambitious of the barristers. It was this circuit which witnessed the unrivalled forensic talents of Sir James Scarlett, whose skill in winning verdicts has never been equalled at the English bar, and the more showy but less effective displays of Brougham. This circuit closes its labors at the great commercial city of Liverpool, and in the month of August of last year I had the opportunity of attending two of its trials, one of a civil and the other of a criminal cause; and a few remarks upon what I then and there witnessed may not be uninteresting to your readers.

The judges who were upon that circuit at that time were Mr. Justice Erle of the queen's bench and Mr. Justice Creswell of the common pleas. Mr. Justice Erle is a person of quiet and dignified manners, with a countenance of florid health strongly expressive of good sense and habits of patient thought. He was appointed to the court of common pleas in 1844, upon the resignation of Mr. Justice Erskine, and transferred to the queen's bench in 1846, upon the death of Sir John Williams. His appointment, which was universally approved by the bar, was highly flattering to his learning and abilities, since it was bestowed upon him by a tory government, to whom he had always been politically opposed. Mr. Justice Creswell was appointed to the bench in 1842, upon the resignation of Mr. Justice Bosanquet. He was at that time a member of parliament from the city of Liverpool and one of the leaders of the northern circuit, and belonged to the tory party. His claims to the bench were acknowledged by all to be superior to those of any other candidate. He is a man of very pleasing personal appearance, a face of youthful freshness, and manners frank, animated, and natural, with an air of high-toned breeding, natural in one who besides having achieved great personal distinction, has the claims, never overlooked in England, of be-

longing to a good family. In point of judicial bearing, so far as my observation extended, there was nothing to be desired in either of these distinguished judges.

In the division of the duties of the circuit, Mr. Justice Creswell presided at the trials of the criminal causes, and Mr. Justice Erle at those of the civil. The former wore a robe of scarlet and ermine, and the latter of plain black silk. The first trial I witnessed was that of a chartist orator for making a seditious speech. He was defended by Sergeant Wilkins and Mr. Pollock; and Mr. Knowles, the attorney-general for the county of Lancashire, conducted the prosecution for the crown. The prisoner had nothing prepossessing, or in any way remarkable in his appearance. He was probably one of those unreflecting men who are possessed of some share of popular eloquence, and are induced by the dangerous applause of an excited multitude to say more than they mean, and to use words the purport of which they are hardly aware of, in the blaze of declamatory passion. The offence was most clearly proved, and the words spoken were uncontestably seditious and incendiary, and the only line of defence was to discredit the witnesses for the crown. These were mostly police officers, and some four or five of them testified to the words spoken with a coincident accuracy which did seem a little suspicious. They were all cross-examined as to their experience in reporting, they all having stated that they made a memorandum of the words at the time, and with a further view of ascertaining their skill in this accomplishment, Mr. Pollock read to them a sentence from a pamphlet and required them to report it on the spot, which they professed themselves unable to do. Mr. Sergeant Wilkins, who led for the defence, is a large, dark, heavy-moulded man, with a square massive face, a stern brow, and a deep voice. His manner, without being graceful, is impressive and weighty. He presented to the jury the obvious points of defence in a manly and vigorous way. At one time, the line of his remarks came so near to a seeming approval of the sentiments of the prisoner that he was checked by the judge, but the interruption neither showed nor awakened any feeling of irritation. Mr. Knowles conducted the prosecution with tact, discretion, and good taste, and never bore hard upon the prisoner. The judge's charge was brief, clear, and decisive, and the jury brought in

a verdict of guilty in a very few minutes. The prisoner was sentenced to two years imprisonment, if I remember rightly.

On the next day, an interesting commercial cause was tried before Mr. Justice Erle. It was an action brought by a firm in Holland against the assignees of a bankrupt house in Liverpool, to recover the value of a cargo which had been taken possession of by the assignees upon the arrival of the ship at Liverpool, on the ground that the conveyance by the bankrupts had been in contemplation of bankruptcy and therefore fraudulent. The conveyance had been effected by indorsement of the bills of lading. The amount involved was upwards of eleven thousand pounds. The case had been tried the year before, and the verdict, which was for the defendants, had been set aside for misdirection of the judge. For the plaintiffs appeared Mr. Knowles and the attorney-general, Sir John Jervis, who came down upon a special retainer. For the defendants, Mr. Martin and Mr. Crompton.

The case on behalf of the plaintiffs was opened by the attorney-general, and substantially argued before the evidence was put in. This is the English manner, and unless the defendant introduces new evidence, the plaintiff has not the privilege of replying. The attorney-general is about fifty years of age, tall and slender in appearance, with a quick, nervous manner, and a voice somewhat affected by a habit of taking snuff. He struck me as more like an American in figure and enunciation than any person I remember to have seen in England. His argument was vigorous, clear, and condensed. The plaintiff's witnesses were then introduced and examined. Mr. Martin then rose and presented the case on behalf of the defendants. His manner was warm and impressive and his speech seemed slightly tinged with an Irish accent. Evidence was then introduced on behalf of the defendants, and the attorney-general closed for the plaintiffs in a speech of considerable power. The charge of the judge was brief, and not dealing much with the facts of the case, but presenting the points of law very distinctly. The verdict of the jury was for the defendants, but though the case was an embarrassing one, I thought the plaintiffs on the whole entitled to it. But all the sympathies of the jury were with the defendants. The plaintiffs were strangers and foreigners; the creditors of the bank-

rupts, the real defendants in interest, were their friends and neighbors. In such conflicts, one must have attained transcendent heights of virtue, to decide without bias.

The court house in which this case was tried was small and inconvenient. The jury sat in a box on the right hand of the judge and very near to him. They frequently make up their verdicts without leaving the box. The barristers sat in those narrow and inconvenient seats, such as I have described in the room occupied by the court of queen's bench in London, the front one being filled by the queen's counsel. The end of this nearest the jury was occupied by the counsel for the plaintiffs, and Mr. Martin sat nearly at the other extremity. By the "courtesy of England," I was allowed to sit between them. They spoke without doing any more than rise from their seats; and indeed, they could not have moved at all, had they been so disposed. Nothing could have been more annoying and paralyzing to one not accustomed to it, than these wooden strait-jackets; I thought at the time of a brilliant advocate at our own bar, whose "contentio laterum" is so effective with juries, and imagined what would have been the expression of his face, had he been called upon to speak in a position so "cribbed, cabined, and confined."

The barristers who conducted the cause were aided by carefully-prepared briefs, written on one side of large square pieces of paper, with an ample margin. The handwriting was as legible as print. These briefs contain an outline of the whole case; abstracts of the documentary evidence, the names of the witnesses, and what they are expected to say; in short, the substance and pith of the case. Without them, it would be impossible to argue the case before the evidence is put in, and it is very rare that any over-statement is made, or that the witness does not confirm his anticipated testimony. As the attorney-general's brief was immediately before me, I could not help noticing on the back the magic character,—

Retainer	. .	300 guineas
Arguing fee	. .	50 "
Consultation	. .	5 "

Such are the splendid rewards of professional eminence in England.

The case was argued ably and thoroughly, but in point of

substantial power and learning it might have been quite as well done at our own bar. But in one respect there was a decided difference. It was conducted with much more temperance, moderation, and smoothness than would have been the case in a question of similar magnitude here. The trial lasted about seven hours, and I am persuaded that it would have taken three days in our country. The addresses to the jury would have been three or four times as long; there would have been more repetition, more vehemence, more declamation. On that occasion, there was not a single superfluous word spoken, and the jury was by no means superior in intelligence to the average of Boston juries.

But the difference was still more marked in the matter of the examination of witnesses. Very few questions were asked — none that were not strictly pertinent — and the cross-examination was very brief, and not in the least degree teasing. One of the witnesses introduced by the plaintiffs was a brother of one of the bankrupts. He was a man of ardent feeling and gave his testimony under strong emotion, so much so as at times to choke his utterance with the "hysterica passio" of poor Lear; yet not the slightest attempt was made to lacerate his susceptible fibres by a torturing cross-examination, so as to wrest from his confusion some slight contradiction or inconsistency. Nothing could have been more gentle and forbearing than the manner in which the few cross-questions to which he was exposed, were put to him. The reason of this is, that in England, cross-examination is rarely used except for the purpose of breaking down a witness who is not speaking the truth, and it was easy to see with half an eye that the witnesses on the present occasion were respectable men, desirous of stating what was true and no more.

Without wishing to draw any invidious comparisons I will also observe that I was most favorably impressed with the tone of decorum and good breeding which presided over the whole trial. The presiding judge was dignified, courteous, and generally silent. On the part of the counsel there were no snappish interruptions, no unseemly vociferation, no angry snarls, no vulgar crimination and recrimination. The gentleman was never for a moment sunk in the advocate.

I am no indiscriminate admirer of the common law, least of

all of the forms under which it administers justice. They seem to me cumbrous and artificial, and in England especially, the practice of the law is so entangled with senseless technicalities, and consequently loaded with such great expenses as to put justice as much beyond the poor man's reach as venison and pine-apples. But the manner in which cases are tried in England is admirable and can hardly be improved. One great reason of this is, that time is so valuable in that country that the utmost expedition, consistent with justice, becomes essential. Thus the most careful preparation is made for trial, every thing is done out of court that can be; the case is stript of its useless integuments and appendages, the essential issues alone are presented, and not a word is spoken that is not pertinent to these. With us, on the contrary, time is of comparatively little value, and every thing is done with a certain crude excess. Successful lawyers, from the want of division of labor, are burdened with a great variety of distracting claims; obliged to act on the same day as barristers, attorneys, special pleaders, conveyancers, and proctors, so that nothing is done with thorough deliberation, and a spirit of hurry and confusion presides over their whole professional life. Thus, cases come on to be tried which are not half prepared, and at the beginning both parties grope along with uncertain steps, and when the trial is half completed they find themselves at that point of progress which is reached in England at the commencement of the trial. This evil is aggravated by our present system of pleading or no pleading, which leaves the plaintiff ignorant of what the defendant requires him to prove, and thus compels him to summon a cloud of witnesses, so as to be prepared on every point, however non-essential it may be.

Furthermore, the court-house is the sphere in which is most signally displayed a trait in our national character to which a momentary allusion has been before made. I refer to our habit of overstatement and exaggeration, of using too many and too fine words; that quality, in short, against which the caution "ne quid nimis" was directed. We value words as our Indian friends do colors; the more glaring the better. We should be happy if we could find any thing that was redder than red and bluer than blue. The quantity of breath, too, that is wasted in our country in unprofitable speaking is beyond estimate.

Every man is born to speech-making here, as the sparks fly upward. Legislative assemblies, political meetings, anniversaries of societies, religious, philanthropic, and literary, openings of railroads and hotels — all are seized upon as so many opportunities for oratorical display. The land groans under the burden of words.

Especially is every thing overdone in the trial of causes. Ten times as many questions are put to witnesses as are necessary; and speeches to the jury are at least five times as long as they need to be. The advice given in the "Plaideurs" of Racine, by a much-enduring judge, to a verbose advocate — "to skip to the deluge" — might often be repeated with us. A court of justice is an institution for the protection of civil rights, and a trial is a contrivance for ascertaining the truth in a given case; and, strictly speaking, every thing which has not a direct tendency to favor that result is mere surplusage. Eloquence, learning, and wit, all the best gifts of the mind, may be so employed as to delay or obstruct that result, as the golden apples of Meleager turned aside the swift feet of Atalanta and lost her the race. With us, a court of justice is too often a stage on which the legal actor struts and frets his hour, and the ends of justice and the interests of a client are postponed to the applause of the "groundlings" and the love of display. Especially to be reprehended is the habit, so common among reckless lawyers, of badgering a witness with irrelevant cross-questions, like a bear at the stake; a practice generally useless and often injurious to the interests of him who indulges in it.

The evil of unnecessarily long trials is believed, at least by the elder members of the bar, to be increasing, and to this cause, more than any other, are to be ascribed those intolerable delays in the administration of the law which amount to a denial of justice. It is but of partial use to multiply means and instruments, so long as the evil which makes the present means and instruments of such imperfect advantage continues to exist — so long as the members of the bar think more of what is due to themselves than to their clients, and more of what is due to their clients than to their profession. It is much to be desired that some rules could be devised by the courts to shorten the trial of issues of fact, and that they should be rigidly enforced by sanctions, addressed not to the pocket of the

suffering client, but to that of the offending counsel. There could be no doubt that such rules would be sustained by public opinion, and the weight of authority at the bar. And beyond the bar we commend to the serious consideration of all good patriots, the formation of a great national society for the suppression of talking, which shall have its principal seat at Washington, with subordinate branches in all the states. Our style in speaking and writing needs bracing and tightening; to be put under training, and brought into condition; to have its swollen and puffy luxuriance reduced to vigorous muscle. The evil is as old as Aristophanes.

> When I received the muse from you, I found her puffed and pampered.
> With pompous sentences and terms, a cumbrous huge virago;
> My first attention was applied, to make her look genteelly,
> And bring her to a moderate bulk, by dint of lighter diet.
> I fed her with plain household phrase, and cool familiar salad,
> With water gruel episode, with sentimental jelly,
> With moral mince-meat; till at length I brought her within compass.
>
> *Aristophanis Rana*, 939, *translated by Frere.*

But I am wandering far from my subject, and I have only to remark, in conclusion, that such opportunities of making the acquaintance of members of the legal profession, as a brief visit and many occupations allowed, were gladly embraced, and that I retain a most grateful sense of the kindness and courtesy everywhere shown to me. Whatever defects our more independent training, and our familiarity with simpler forms, may suggest in English law, or English practice, a stranger must be very unreasonable not to be pleased with the manners and conversation of English lawyers. He will find among them a prompt recognition of the debt due by our common profession to American jurisprudence, an unaffected respect for the decisions of our tribunals, and especially the highest esteem for the writings of Judge Story.* No American lawyer will ever present himself

* I am tempted here to relate an anecdote which shows at once the high reputation of Judge Story, and the amazing ignorance of our country, common in England, in men otherwise very well informed. I was once travelling in Switzerland with a gentleman of the chancery bar, and in the course of conversation, I had mentioned the names of some of those English lawyers and judges which are perfectly familiar to every legal tyro in our country, when he remarked, "how came you to know so much about England and Englishmen. I never heard of but one American, and that was Judge Story." The subdivision of mental labor in Europe not unfrequently leads to the strange combination of profound knowledge upon a few subjects, and entire ignorance of all others. My travelling companion, whom I have just mentioned, told me that a legal writer of reputation, whose name is well known in our country, had once asked at a dinner table, in perfect good faith, whether macaroni was an animal or a vegetable substance.

before his professional brethren in England, in a social attitude, without having his claims most courteously and considerately heard; and if he fail in his suit he may rest assured that it arises from that disability of the person which makes writs abatable, and not from any undue bias in the minds of his judges as to the merits of the case.

Recent English Decisions.

Court of Common Pleas — Sittings in Banc after Hilary Term — May 5, 1848, and Feb. 13, 1849.

Smith *v.* Kenrick.

Adjoining collieries — Duty of owners — Injury from the flowing of water — Consequential damage.

It is the natural right of each of the owners of two adjoining coal-mines, neither being subject to servitude to the other, to work his own mine in the most beneficial manner to himself, though the natural consequence may be that some prejudice would accrue to the owner of the adjoining mine, so long as it does not arise from negligent or malicious conduct.

The plaintiff was possessed of a colliery adjoining another in the possession of one E. J., and which was on a higher level than the plaintiff's. E. J. made large holes called "thyrlings," through a seam of coal belonging to the plaintiff, which bounded his colliery, and formed a barrier between it and the colliery of E. J. The defendant afterwards became the occupier of the latter colliery, without any privity between him and E. J. In the course of working his colliery, and for the purpose of obtaining coal, the defendant removed a bar of coal which was part of his own colliery, in consequence of which a body of water flowed into the chambers of his colliery, and from thence through the "thyrlings" into the plaintiff's colliery. The defendant, before he removed the bar, knew that these "thyrlings" were open and that the effect of such removal would be that the water would of itself so flow into the plaintiff's colliery. The plaintiff brought an action against the defendant for the injury thereby caused, in which he recovered compensation. The water afterwards continuing to flow through the "thyrlings" — *Held*, that the defendant was not liable for the same, there being neither a special nor general duty imposed on him to prevent the water from flowing into the plaintiff's colliery.

This was an action on the case, in which the New British Iron Company, who sued by their secretary and registered public officer, were the real plaintiffs, to recover damages against the defendant for wrongfully omitting to prevent water from flowing through his mine into the mine of the company,

and also for wrongfully causing water to flow from his mine into the mine of the company. The cause came on for trial at the Chester Summer Assizes in the year 1846, when, by order of nisi prius, a verdict was found for the plaintiffs, subject to a special case, to be stated for the opinion of the court of common pleas by a barrister at law, to whom, after the court should have given judgment on the case, all matters in difference between the said parties were, by the said order, referred. The pleadings in the action and the said order of *nisi prius* were to form part of the special case. The plaintiffs abandoned the first count of their declaration, in obedience to the said order of *nisi prius;* and the second count in substance was, (as stated by the court in delivering their judgment,) that there were two collieries under ground, adjoining one another, one called Plas Bennion, and the other Avon Eitha, the Avon Eitha being on a higher level than the Plas Bennion; that Plas Bennion had many chambers from which coal had been extracted, and belonged to a party called the Plas Bennion Colliery; that there had been a wall or seam of coal between those chambers and certain other chambers, forming part of Avon Eitha Colliery, from which coal had been extracted; that the plaintiffs were in possession of the Plas Bennion Colliery, and while the company were so possessed of Plas Bennion, one Evan Jones and others were possessed of Avon Eitha, and while they were so possessed the said Evan Jones and the other persons who were possessed of the Avon Eitha Colliery, by force and arms, broke into and entered the Plas Bennion Colliery, and made divers holes in the wall forming the eastern extremity thereof, and from such wall aforesaid extracted large quantities of coal; and, after the extraction of the said coal, the said Evan Jones and others ceased to be possessed of Avon Eitha; and the defendant became possessed of Avon Eitha, and whilst the defendant continued so possessed the holes remained and were not stopped up, and, by reason of the grievance so committed by the said Evan Jones, the Plas Bennion Colliery became, and was, and still is, liable to be inundated and flooded on occasions of water being introduced into Avon Eitha, by such water coming to the eastern extremity of the Plas Bennion Colliery, and penetrating through the holes; that, before the said holes were made, and before the extraction of the coal from the seam or

bed of coal, that seam of coal into and through which the water was introduced would have formed a barrier sufficient to prevent the water going into the Plas Bennion Colliery; and that, by reason of the defendant's possession of the Avon Eitha Colliery, the defendant, while so possessed, and still, of right ought to prevent the water introduced to Avon Eitha by the defendant flowing through the said holes, and penetrating through the seam or vein of coal in the eastern extremity of Plas Bennion. The count then charged, that the defendant wrongfully introduced large quantities of water into the Avon Eitha Colliery, and that the defendant wrongfully omitted to prevent the said water so introduced into Avon Eitha from flowing into Plas Bennion. The defendant pleaded "not guilty;" and, besides several other pleas, pleaded another denying the right to prevent the water flowing into Plas Bennion, as alleged in the second count. The defendant also pleaded a judgment recovered in a former action. The following is the case which was submitted for the opinion of the court: — The plaintiffs, for many years last past, and up to the time of the commencing this action, have been in possession of a colliery called Plas Bennion, in the parish of Ruabore, in the county of Denbigh. In the year 1840, and while the plaintiffs were in the possession of Plas Bennion as aforesaid, one Evan Jones and others, his partners, became possessed of an adjoining colliery in the same parish. Evan Jones and his partners continued to be possessed of the last-mentioned colliery until the month of December in the year 1844. At this time they quitted possession, and were succeeded by the defendant, who has remained in possession ever since. The Avon Eitha Colliery is on a higher level than the Plas Bennion Colliery. At the time when Evan Jones and his partners commenced their occupation of the Avon Eitha Colliery, both that colliery and the Plas Bennion Colliery had been worked to a great extent, and they each contained several chambers, made by the removal of large quantities of coal. At the time last mentioned the colliery of Plas Bennion was bounded on the east by a vertical seam or vein of coal, the property of the plaintiffs, and part of their colliery; and this seam or vein of coal formed a barrier between the chambers in the Plas Bennion and the other chambers in Avon Eitha. In the beginning of the year 1844, Evan Jones and his partners made

three large holes, called "thyrlings," in and through the barrier above mentioned, for the purpose of giving air to the Avon Eitha Colliery. The defendant became the occupier of Avon Eitha without any privity, either of contract or of estate, between him and his predecessors, Evan Jones and his partners. At the time when the defendant became such occupier there was a large subterranean body of water in Avon Eitha, which communicated with and was fed by springs in the neighborhood. This body of water was on a higher level than the chambers of Avon Eitha, and separated from them by a thick horizontal bar of coal, which was part of the Avon Eitha Colliery. The chambers of Avon Eitha were on a higher level than the thyrlings above mentioned, and the thyrlings were on a higher level than the chambers of Plas Bennion. The effect of removing the horizontal bar of coal in Avon Eitha would be, that the water above mentioned would of itself flow into the chambers of Avon Eitha, and that a large portion of such water would also flow on of itself from the chambers of Avon Eitha, through the thyrlings, into the chambers of Plas Bennion. The defendant, during his occupation, and before the month of June in the year 1845, knowing that these thyrlings were then open into Plas Bennion, and that the effect of removing the horizontal bar of coal in Avon Eitha would be as above stated, nevertheless did remove the said bar of coal for the purpose of obtaining the said bar of coal, and so working his mine in the manner most advantageous to himself. In consequence of the removal of this horizontal bar of coal in Avon Eitha, the water of itself flowed from the said subterranean body of water into the chambers of Avon Eitha. One portion of the water, which had so flowed into the chambers of Avon Eitha, flowed on of itself, through the thyrlings, into the chambers of Plas Bennion, and which, if not obstructed in its natural course, would have flowed down to the bottom of Avon Eitha and below the thyrlings, was obstructed in its natural course by a dam which the defendant had placed in Avon Eitha, and near to the thyrlings, and was thereby thrown through the thyrlings into the chambers of Plas Bennion. This dam was removed before the commencement of the action next after mentioned, by some of the workmen in the Plas Bennion Colliery. The vertical seam of coal, above mentioned as forming the boundary of Plas Bennion, would have been

sufficient to have prevented the said flow of water into Plas Bennion, if the thyrlings had not been made as aforesaid in the said seam of coal by Evan Jones and his partners. On the 4th June, 1845, the plaintiff brought an action on the case against the defendant for the injury caused to Plas Bennion by the flow of water as aforesaid. On the 30th January, 1846, the defendant paid £70 into court, and pleaded the payment in the usual form; and, on the 28th March in the same year, the plaintiff replied, accepting the said payment in satisfaction. The record in that action is to form part of the present case. The present action was brought on the 30th April, 1846. Since the commencement of the first action, and up to the time of the commencement of the present action, water has, in consequence of the said horizontal bar of coal in Avon Eitha as aforesaid having been removed, occasionally flowed of itself, in the manner already stated, from the said subterranean body of water in Avon Eitha, into the chambers of Avon Eitha, and so also flowed on of itself, through the thyrlings, into the chambers of Plas Bennion, in the same manner as has been before stated; and the colliery of Plas Bennion has been thereby injured. With respect to the sufficiency of the said vertical seam of coal forming the eastern boundary of Plas Bennion, as a subsisting barrier to prevent the last mentioned flow of water, if the thyrlings had not been made in the said barrier, and with respect to the defendant's knowledge that the thyrlings continued open, the facts are the same as before stated with reference to the former action. The defendant contended, first, that this action was not maintainable, as the defendant, in getting the coal from his own mine in the manner stated, had not done any act which it was his duty to refrain from; secondly, that, at all events, he had done no new act whatever, since the commencement of the first action, to cause a continuance of the flow of water into Plas Bennion. The damage now complained of might have been compensated for in that action; and, therefore, that the former recovery was a bar to this action. The plaintiffs contended, first, that it was the duty of the defendant to refrain from cutting through the bar of coal in his own mine, under all the circumstances of the case; secondly, that, at all events, by paying money into court in the former action, the defendant had estopped himself from disputing the alleged

duty; thirdly, that the recovery in the former action was no bar. The question for the opinion of the court was, whether the present action was maintainable. The case was argued in easter term, 1848, by

Townsend and *Egerton* (*T. Jones* with them,) for the plaintiff. It was the duty of the defendant to have prevented the injury arising to plaintiff's colliery by keeping open the thyrlings made in the barrier between the two collieries. No one has a right so to use his own property as to occasion injury to the property of his neighbor. The maxim "*Sic utere tuo ut alienum non lædas*" applies to this case. The plaintiff's right to work his own colliery has been interrupted and injured by the flowing of the water into Plas Bennion through the thyrlings, which was the necessary consequence of the defendant's own act. There is here, therefore, *damnum* coupled with *injuriâ*. *Ashby* v. *White*, (1 Smith's Lead. Cas. 131.) The principle is thus stated in *Lambert* v. *Bessey*, (Sir. T. Raym. 422): — "In all civil acts the law doth not so much regard the intent of the actor as the loss and damage of the party suffering; and, therefore, (Mich. 6, E. 4, 7 a. pl. 18,) trespass *quare vi et armis clausum fregit et herbam suam pedibus conculcando consumpsit* in six acres. The defendant pleads, that he hath an acre lying next the said six acres, and upon it a hedge of thorns, and he cut the thorns, and they, *ipso invito*, fell upon the plaintiff's land, and the defendant took them off as soon as he could, which is the same trespass; and the plaintiff demurred: and adjudged for the plaintiff; for though a man doth a lawful thing, yet if any damage do thereby befall another, he shall answer it if he could have avoided it. As if a man lop a tree, and the boughs fall upon another *ipso invito*, yet an action lies." And in the case in the Year Book, 6 Edw. 4, 7 a. and referred to in Gale on Easements, (p. 237,) Pigott, J., says, "So, if a man hath a pond in his manor, and lets off the water in order to catch the fish therein, and the water surrounds my land, I shall have an action, though the doing so by him was lawful." There is no difference, as to the liability of the party, where the act which occasions the injury is done on the surface, or, as here, under ground, if the party injuring is cognizant of that act. The defendant in this case knew that the thyrlings were open, and what would be the effect of re-

moving the bar of coal in Avon Eitha. This distinguishes the present case from *Acton* v. *Blundell*, (12 Mee. & W. 324.) In *Tenant* v. *Goldwin*, (1 Salk. 360,) it was held, that the plaintiff was entitled to recover damages against the defendant, who had allowed his wall to be out of repair, so that the filth from his vault ran into the plaintiff's cellar. *Haward* v. *Bankes*, (2 Burr. 1113) was an action resembling the present. There the defendant's colliery lay near to that of the plaintiff, and communicated with it, though not immediately, but mediately, there being some other collieries lying between them; and the plaintiff brought an action upon the case for damage done to his colliery by what the defendant had done in his own colliery and within his own soil. The plaintiff having obtained a verdict, it was moved, in arrest of judgment, that two of the counts were essentially in trespass, though laid in case; and that there had, therefore, been a misjoinder. The court overruled the objection, on the ground that the evidence at the trial showed that the counts were properly trespass upon the case, and the plaintiff accordingly had judgment in his favor. It amounts to a precedent, therefore, for such an action as the present. Is not the injury sustained by the water in the defendant's colliery being allowed to flow by the defendant into his neighbor's colliery similar to the injury sustained by a person so negligently keeping a fire in his field that it burnt the corn in the adjoining field of his neighbor? Such an action was held to lie in *Tubervil* v. *Stamp*, (1 Salk. 13.) The court, in that case, said, "The fire in his field is his fire, as well as that in his house; he made it, and must see it does no harm, and answer the damage if it does. Every man must use his own so as not to hurt another; but if a sudden storm had arisen, which he could not stop, it was matter of evidence, and he should have showed it." *Firmstone* v. *Wheely*, (2 D. & L. 203,) is an authority for showing, that there is such a duty imposed on the defendant as to prevent the water from flowing from his mine into that of the plaintiff. At all events, such a duty was there alleged, and the court held the count to be a good count in case, and not to amount to a count in trespass. [It was also contended, that the recovery in the former action was no bar to the present, which was in respect of a continuous neglect, and that no prospective damages could

be calculated in the former action. *Roberts* v. *Read*, (16 East, 215,) and *Holmes* v. *Wilson*, (10 Adol. & Ell. 503.) Also, in the course of the argument, the following additional authorities were cited: — *Rosewell* v. *Prior*, (1 Salk. 459); *Vaughan* v. *Menlove*, (3 Bing. N. C. 468); *Aldridge's case*, (9 Rep. 59); *Filliter* v. *Phippard*, (12 Jur. 202); *Boyle* v. *Tamlyn*, (6 B. & C. 329); 3 Kent's Commentaries, 436; *Acton* v. *Blundell*, (12 Mee. & W. 324); *Arkwright* v. *Gell*, (5 Mee. & W. 203); *Sutton* v. *Clarke*, (6 Taunt. 29); *Harris* v. *Ryding*, (5 Mee. & W. 60); *Brown* v. *Windsor*, (1 C. & J. 20); and *Thompson Gibson*, (7 Mee. & W. 456.)]

Welsby, (*Evans Q. C.*, and *Brown* with him,) contra. — There was no privity between the defendant and Jones, the former owner of the Avon Eitha Colliery, and who was the party who had made the thyrlings in the barrier between the two collieries. It is submitted that the defendant is, therefore, not liable for the continuing to keep open those thyrlings, and that he was entitled to use his own colliery, by getting coals from it, and working it for that purpose in the most advantageous manner to himself. The knowledge that, in so using his colliery, the plaintiff might sustain an injury, is no material element in the present case. The cases cited on the other side were either where some act of trespass was done by the defendant himself or by a party with whom he was privy, or were the result of some negligence of the party charged. Here the defendant has been guilty of no negligence, nor has he omitted any legal duty in getting the coals from his own colliery. It is the case of land in an artificial state, by reason of the excavations, requiring, in consequence, greater support than it would ordinarily need; and the case is analogous to that where land has been loaded on its surface, by building or otherwise; in which case the law is, that a party has no right to complain if the owner of the adjoining land has withdrawn some of the support it would have had by its proximity to the adjoining land. *Wyatt* v. *Harrison*, (3 B. & Adol. 871) is an authority to that effect. There it was held, that the possessor of a house, which is not ancient, cannot maintain an action against the owner of adjoining land for digging away that land so that the house falls in. 2 Roll. Abr. "Trespass," (1,) is consistent with this. *Dodd* v. *Holme*, (1 Adol. & Ell. 493) was, where

the defendant had negligently dug his own soil. *Partridge* v. *Scott*, (3 Mee. & W. 220,) shows that the owner of land may work coal under his own land, and to its very extremity, without being liable for any injury which may be thereby occasioned to a house on the adjoining land, where no right to the support of such house from the adjoining land has been acquired by grant or the lapse of twenty years. A person occupying land adjoining the sea might remove trees or a wall which had been there only within twenty years, and, by such removal, the vegetation in the land of a neighbor adjoining might be injured in consequence of the admission thereon of saline particles and sea breezes; such person, surely, would not be liable for any action? There might be a damage, but no injury would concur with it. The cases cited on the other side do not apply. The case of the man letting off the water from his pond falls clearly within the rule of "*sic utere tuo ut alienum non lædas;*" for he might have taken the fish out by a net, or various other ways, without doing an injury to the adjoining land. *Haward* v. *Bankes*, most resembles the present case, it is true; but there the plaintiff had judgment only because the count was good upon the face of it; and the evidence might have been, that the injury was a direct act done by the defendant. *Farmstone* v. *Wheeley*, was no decision upon the point; it was merely a question of pleading. And in *Turbervil* v. *Stamp*, the defendant himself had been guilty of a wrongful act. *Vaughan* v. *Menlove*, (3 Bing. N. C. 468,) and *Filliter* v. *Phippard*, (12 Jur. 202,) were cases of negligence on the part of the defendant, and for which negligence the actions were maintainable. Surely the owner of land is not to be prevented from turning it to the most beneficial purpose? It might be required that the land should be drained; and is the owner not to be allowed to have recourse to draining, because the removal of the waters from his land may cause an injury to an adjoining land? It was held, in *Rex* v. *The Commissioners of Sewers for Pagham*, (8 B. & C. 355,) that all the owners of land exposed to the inroads of the sea have a right to erect such works as are necessary for their own protection, even although they may be prejudicial to others. *Keighley's case*, (10 Rep. 139 b); *Sutton* v. *Clarke*, (6 Taunt. 29); Callis on Sewers, p. 176.

Townsend replied, citing 2 Fitz. N. B. 184 (D), where it is said, "A man shall have an assise of nuisance for building of a house higher than his house, and so near his, that the rain which falleth upon that house falleth upon the plaintiffs house. *Cur. adv. vult.*

Feb. 13. The judgment of the court was now delivered by CRESSWELL, J. — His lordship, after stating the pleadings as above, and the substance of the special case, said: —

The claim of the plaintiffs to compensation in this case is advanced upon two grounds: first, on the supposed duty of the defendant, arising out of the act of Evan Jones in removing the plaintiff's barrier of coal when he occupied Avon Eitha, and the subsequent occupation of the same by the defendant; and, secondly, on the general liability said to be imposed by law upon the defendant, in being responsible for the injury done to the adjoining colliery by water casually introduced into his own, in consequence of the working of his colliery. As to the first point, it is to be observed, there was no privity of any kind between Evan Jones and the defendant; the act done by Evan Jones was not on the premises now occupied by the defendant, but on those of the plaintiff; nor does the defendant derive his title to the premises he occupies in any way from Evan Jones. In the special case, it is expressly stated there is no privity of any kind between Evan Jones and the defendant. In *Rosewell* v. *Prior*, (1 Salk. 459,) the defendant was tenant for years, and erected on his own premises that which was a nuisance to the plaintiff's house, and then made an underlease; and it was held, that the plaintiff might sue either the defendant or the sub-lessee. On the same principle, if Evan Jones did any thing in Avon Eitha Colliery which made the premises in their then state a nuisance to the plaintiff's colliery, the defendant, as occupier, might have been made responsible for continuing them in the same state, and so upholding the nuisance. But this is a very different case. The premises occupied by the defendant are not a nuisance; and the act done by Evan Jones, which is an injury to the plaintiff, was upon the plaintiff's soil, where he, the defendant, would have no right to go, even if he wished it, for the purpose of remedying the evil Evan Jones had formerly done. We think

there is no special duty in the defendant to protect against water the plaintiff's mine when he occupied Avon Eitha, in consequence of his having succeeded, in such occupation, Evan Jones, who removed the plaintiff's barrier. The next ground on which it was contended that the defendant was liable is broader, namely, that he was of common right bound to prevent the water coming into his own mine from flowing into his neighbor's. In considering this question, it is important to remark, that in the special case it is stated, the defendant worked out the coal which protected his own mine from the subterranean body of water, for the purpose of obtaining the coal, and so working the mine in a manner beneficial to himself. There is nothing from which we can infer that that was an unusual or negligent mode of proceeding, or done with any design to injure his neighbor's mine. In order to establish the proposition that the defendant was bound to prevent the flowing of the water into the plaintiff's mine, the case of *Tenant* v. *Goldwin*, (1 Salk. 360,) was relied on. That was an action on the case, in which the plaintiff declared that he was possessed of a messuage in which a cellar was built to lay coals, &c., and that the cellar adjoined the defendant's messuage, and by the wall of the defendant the cellar was separated and divided from the defendant's privy, and for want of repairing the wall the filth flowed through into the plaintiff's cellar. There was judgment by default, and damages were assessed upon a writ of inquiry. Then there was a motion in arrest of judgment, and the declaration was held sufficient; and Lord Holt said it was the defendant's wall, which the defendant built, and that he was bound at common law to keep the wall so as not to damnify the property of his neighbor; and it was a trespass on his neighbor, as if his beasts should escape and stray into the land of his neighbor. That was, therefore, a very different case from the present. There was here no barrier between the plaintiff's mine and the defendant's which the latter could repair; and the flow of water into the plaintiff's mine cannot be considered a trespass. Again, the declaration in that case was held good on account of the words "*debet reparandum*," which are inapplicable to the present case. But for the removal of part of the barrier of coal that existed in the plaintiff's mine, the water in the defendant's mine would

have done no harm; and for that removal the defendant is not responsible. A great many cases were referred to in the argument, independently of all question as to the removal of the barrier, to show that the defendant was bound, at all events, to take care that the water which flowed in his own mine should not pass into another's. *Vaughan* v. *Menlove*, (3 Bing. N. C. 468); *Sutton* v. *Clarke*, (6 Taunt. 29); *Boyle* v. *Tamlyn*, (6 B. & C. 329); *Brown* v. *Windsor*, (1 C. & J. 20); *Dodd* v. *Holmes*, (1 Adol. & Ell. 493,) and other cases, were referred to. In each of these, the negligence imputed to the defendant, in doing the act on his own premises, had proved injurious to his neighbor's; but here there is nothing to show any negligence, on the part of the defendant, in working the colliery. The case quoted from the Year Book, 6 Edw. 4, transferred to Sir Thomas Raymond, was relied on as an authority for the plaintiff, where no negligence was imputed to the defendant. But, on examination of the original report in the Year Book, it appears to us hardly to support that statement. It was an action of trespass on the plaintiff's close, and damaging the grass, &c. The defendant justified, for that he had a close separated from the plaintiff's by a thorn hedge, and when cutting the thorns they fell, *ipso invito*, into the plaintiff's close, wherefore he entered into the close to take them away. After much discussion, it was held, that, in order to make the plea good, not only must the thorns have fallen *ipso invito*, but that he did all in his power to prevent them falling into the plaintiff's soil. The case of *Haward* v. *Bankes*, (2 Burr. 1113,) was said to be a direct authority for the plaintiff; but it is not so. The decision of the court was given on a count charging the defendant with having caused water to flow through divers other collieries into the plaintiff's, which was a count in case; and it is true that the plaintiff recovered in that action; and though there can be no doubt that a man may cause water to flow into his neighbor's premises, so as to make him liable to an action — as, for instance, by erecting a mound of earth, and giving it a certain direction, as appears to have been done by the present defendant before the former action was commenced, in which he paid money into court as compensation — in this case, it cannot be said he *caused*, but that he *permitted*, the water to flow into the plaintiff's mine. Another

case relied on by the plaintiff was *Firmstone* v. *Wheeley*, (2 D. & L. 203,) which also differs from this case in a material particular, namely, that the defendant had removed from the plaintiff's mine, by trespass, a barrier of coal, which, had it existed, would have prevented the water flowing from the defendant's mine to the plaintiff's; and, though hardly to be treated as a decision, the court of exchequer appear to have thought, the defendant, having wrongfully removed the barrier, was bound to protect the plaintiff's mine against the flowing in of the water; and if this action had been against Evan Jones, who had occupied Avon Eitha, it might have been urged as an authority against him; but if Evan Jones had been sued in trespass for removing the barrier, a second action could not have been maintained against him for the consequential damage. (See *Clegg* v. *Deardon*, 17 Law Journ., N. S., Q. B., 845.) If no such action could be maintained against him, it would be singular if it could be maintained against a party not in any way connected with him, for consequential damages arising from his act of trespass. Treating the question as a new one, not governed by the authority of any decided case, (for all those referred to are distinguishable,) it would seem to be the natural right of each of the owners of two adjoining coal-mines, neither being subject to servitude to the other, to work his own mine in the most beneficial manner to himself, though the natural consequence may be, some prejudice would accrue to the owner of the adjoining mine, so long as it does not arise from negligence or malicious conduct. In the present case it could not be disputed, that, but for the excavation of the plaintiff's coal, the defendant would have been entitled to work out the whole of his own coal; for, if the space which it occupied afterwards became filled with water, it would have done no harm to the plaintiff if his own coal actually had not been excavated. If he afterwards excavated his own, and if the water flowed in from the defendant working his own coal, he would not have any right of action for the damage. This position would be similar to that suggested by Lord Holt, in the case before mentioned, of *Tenant* v. *Goldwin*, where he says, "The case, indeed, might possibly be such, that the defendant might not be bound to repair — as, if the defendant made a new cellar under the defendant's own privy, or in a

vacant piece of ground which lay next the whole privy before; in such case the plaintiff must defend himself." Though here, however, the working of the two mines has been simultaneous. But, then, the defendant's mine not being subject to any servitude, what authority is there for saying that the plaintiff, by working his coal, could alter or abridge the defendant's right to work his own. It is certainly a reasonable thing that the plaintiff should leave part of his own coal to protect his own working against the influx of water. The plaintiff took that view of the matter, and left a barrier; and, in his opinion, it would have been sufficient for the purpose, if it had not been broken through by a wrongdoer, for whose act the defendant is not responsible. There are many cases in which the principle is recognized, that one landowner, by altering the condition of his land, cannot deprive the owner of the adjoining land of the privilege of using his own as he might have done before. Thus, he cannot, by building a house near the margin of his land, prevent his neighbor from excavating his own land, though it may endanger his house; or from working on his own land, though it may subsequently prejudice him, unless, from the lapse of time, the adjoining land has become subject to a right analogous to what it would have been in the case of a qualified servitude. See *Acton* v. *Blundell*, (12 Mee. & W. 324,) where the subject was very much discussed; and the court held, that one landowner, having dug a well on his own land, could not maintain an action against a party who afterwards sunk a coal-pit in the neighborhood, which had the effect of drawing the water away from the well, the act not being done by the defendant negligently or maliciously, but in a proper manner, for the purpose of winning his own coal. We think the same principle is applicable to the present case. Water is said to be a common enemy, *Rex* v. *The Commissioners of Pagham Level*, (8 B. & C. 355,) against which each man must defend himself. This is in accordance with the civil law. It was considered, that land on the lower level owed a natural servitude to that on the higher level, in respect of receiving and claiming compensation for water naturally flowing down. (Com. Dig. 39, tit. 3.) Other points were explained to the court in the special case, but of which little was said on the argument, namely, that the defendant, by paying

money into court in the former action, had precluded himself from saying he was not liable to be sued in this action; but, on looking to the declaration, he was charged with turning water into the plaintiff's mine, for which he was responsible; and the admission of that in that action can have no bearing on this. On the whole, we are of opinion the plaintiff is not entitled to recover, and that the judgment must be for the defendant. *Judgment for the defendant.*

Rolls Court. May 1, 1849.

The Grand Junction Canal Company *v.* Dimes.

Interest in a judge — how far it incapacitates him from acting.

It is a fundamental and important rule, that no one ought to be a judge in his own cause, and that no judge ought, by himself or his deputy, to hear and determine any cause, or make any order, or do any judicial act, in a cause in which he has a personal interest; and this rule ought not to be departed from without necessity, but it must give way to circumstances, and to the necessity of avoiding a denial of justice.

There is no difficulty in acting on the rule where there are several courts having concurrent jurisdiction, or where there is one court consisting of several co-ordinate judges; but where the whole jurisdiction is vested in one judge, or where there are no co-ordinate judges, and the subordinate judges are, in effect, deputies, whose decisions are not complete till sanctioned and adopted by the supreme judge, as in the court of chancery, cases must arise in which it will be impossible to act in strict conformity with the rule without a failure of justice. And for this reason the rule cannot, in strictness and to its full extent, be applied to the lord chancellor in cases in which he has such an interest as, according to the practice of the court, does not make him a necessary party to the suit.

There is not, and cannot, in any case, be an incapacity of the judge to make an order or do any act in a matter within his proper, peculiar, and exclusive jurisdiction, if such order or act be necessary to prevent a failure of justice; and, whatever interest a judge may have, if justice cannot be had without an act or order of his, he cannot refuse to act.

In cases where questions of this kind arise, the judge must have and exercise a discretion, and, having the capacity, must not interfere further than the necessity of the case requires.

In a case in which the question was between an individual and a canal company, in which the chancellor held shares, as to the right to a piece of land over which the canal flowed, and an order was made on appeal by the lord chancellor, the master of the rolls, who heard the application at the request of the chancellor, refused to discharge the order, on the ground that it was vitiated by such interest in the chancellor.

This was a motion by the defendant William Dimes, that a certain order made in the cause, dated the 27th January, 1848,

on the petition of rehearing and appeal presented by him to the lord chancellor, might be discharged, and that the plaintiffs might be ordered, within three days after service of the order to be made on the notice of motion, to replace in the hands of the registrars of the court the sum of 20*l.*, deposited by the defendant upon presenting his said petition of rehearing and appeal mentioned in the said order; and also to repay to the defendant the sum of 65*l.* 10*s.*, the amount of the taxed costs of the plaintiffs, incurred in and about the said petition, and which had been paid by the defendant to the plaintiffs in pursuance of the said order; and that the defendant might be at liberty to amend the said petition of rehearing and appeal, by inserting the names of the defendants, A. Boham and William W. Martin in the title thereof; and that the said petition, when so amended, might be restored to the lord chancellor's paper of rehearings and appeals; and that proper directions might be given by the court, by issuing a commission or otherwise, as might be necessary for the hearing and determination of the said petition of rehearing and appeal before the master of the rolls, assisted by two judges of her majesty's courts of common law. The order of 27th January, 1848, was made by the lord chancellor, affirming the decree of the vice chancellor of England. The order was not sought on the present occasion, to be set aside on the merits, but on the ground, simply, that the lord chancellor had, at the time he made it, such an interest in the subject-matter in dispute between the litigant parties as disqualified him for acting as judge in the case. The subject-matter in dispute, was a piece of copyhold land, extending about half a mile, over which the plaintiffs' canal flowed, situate in the manor of Rickmansworth, of which the defendant, Dimes, was the lord, and as such, he claimed the right of possession and beneficial ownership of the piece of land in question, as against the plaintiffs. It appeared, that, at the time he made the order, and long previously, the lord chancellor was the owner of several shares in the plaintiffs' undertaking, some being held by him in his own right, and the rest in a fiduciary or representative character. At the date of the order, and for some time afterwards, the defendant, Dimes, was ignorant that the chancellor was a shareholder in the company. When he was informed of the fact, he applied to the directors for information as to the

shares held by his lordship; but the directors having declined to give this information without the authority of the chancellor, the defendant applied to the chancellor on the subject, who authorized the information sought to be given to him. It was not suggested for the defendant, Dimes, that the interest possessed by the chancellor influenced his decision, or that he even recollected, at the time he heard the case or made the order, the existence of his interest in the company: on the contrary his hearing the case was attributed to inadvertence, or forgetfulness of his interest in the company; but it was contended, that by an inflexible rule of law, he was incapable, whilst so interested, to act judicially in the matter. The present application was heard by the master of the rolls, at the request of the chancellor.

W. T. Daniell, (with whom were *Peacock* and *Smythies*,) for the defendant Dimes. — The hearing which took place before the chancellor was, in effect, *coram non judice*, and the order sought to be discharged is void. The fact on which I rely, as the foundation for this allegation of nullity, is the existence of a pecuniary interest in the judge — a latent interest, no doubt, but not merely nominal — an interest directly relating to the subject-matter in contest between the parties, and one which incapacitated him from acting judicially in the matter. The rule which incapacitates is laid down in Roll. Abr., tit. "Judge," pl. 11. It is also stated as a resolution, in *Lord Derby's case*, (6 Co. Rep., p. 356, part 12, fol. 114.) That is the only reported case applying the rule to the chancellor, that he cannot decide a matter between two strangers in which he is concerned in interest for himself. But the rule that a party cannot be a judge in a case in which he is interested, has frequently been stated as to inferior jurisdictions. *The Mayor of London* v. *Wood*, (12 Mod. Rep. 688); *Brookes* v. *Lord Rivers*, (Hard. 553; *Great Charte* v. *Kennington*, (2 Stra. 1173); *Rex* v. *Yarpole*, (4 T. R. 71); *Rex* v. *Gudridge*, (5 B. & C. 459); *Reg.* v. *The Cheltenham Commissioners*, (1 Q. B. Rep. 476.) The last case is material, as showing the extremely minute interest which is sufficient to disqualify a party from acting judicially. The law does not regard the amount of interest: it protects the judge in the administration of his duty

from all possibility of having interested motives imputed to him, by creating an absolute incapacity to act. Some qualification was suggested to the rule, in the case of magistrates, by Denman, C. J., and Patteson, J.; but that *obiter dictum* was corrected by them in the subsequent case of *Reg.* v. *The Justices of Hertfordshire*, (6 Q. B. Rep. 753.) These authorities at common law are authorities which are only instances in which the principle is to be applied — they are not authorities limiting the principle to inferior jurisdictions. They are authorities which indicate and prove the existence of this vital principle in the administration of justice, in whatever form justice is administered. This, as a general question, is of great importance. The tendency of modern legislation is, from the just and unbounded confidence, which, from experience, the people of this country have in the integrity of the bench, to vest the administration of justice in the hands of single individuals. If pecuniary interest is a matter of discretion, what is to prevent a master in ordinary from winding up a joint stock company in which he is a shareholder? What is to prevent a taxing master from taxing a bill, which, when taxed, he is under a latent liability to pay? Take the case of recorders, who are now, by the municipal corporation act, made sole judges of their respective courts. To each of the recorder's courts is annexed a court of civil jurisdiction. In some of the ancient recorderships those courts are of unlimited authority. Suppose, in any particular place in which there happened to be dock companies, gas companies, or other joint-stock companies, a question relating to property should come before the recorder, in the shape of an action brought by a dock company against an individual, to try the right to the land out of which the dock is made; and suppose the recorder has a latent interest, having *bonâ fide* purchased shares, or having shares held by him in trust, and that he should omit to mention that he had that interest, and should adjudicate on the question; would not that be an excess of authority? If such a judge were to commit such a mistake, it would be fatal to him for the rest of his professional life. And if this question is to be argued as a question of jurisdiction, so far from creating any embarrassment, it is fortunate that it has arisen with regard to the lord chancellor; for no such imputation can rest on him as might rest

on an inferior judge, if such an act of inadvertence had happened. So, in the case of stipendiary magistrates or county court judges, the jurisdictions are fixed; they may reside within their jurisdictions; they are exclusive judges of fact and law, and judges without appeal. Is it to be said that it is a matter of discretion for such a judge to sit, without appeal, in a matter in which he has a latent pecuniary interest? With respect to so much of the notice of motion as asked for directions consequent on the discharge of the order, it was contended, that they followed of course, except as to the issuing a commission to the master of the rolls and two common-law judges to hear the petition of appeal, which was given up.

Stuart, *Turner*, *J. Parker*, and *Busk*, appeared for the Grand Junction Canal Company. The substance of their arguments is embodied in the judgment.

Randell, for the defendants Boham and Martin.

Lord LANGDALE, M. R. — In this case the lord chancellor was moved that an order made by him, on the petition of appeal and rehearing of the defendant Dimes, might be discharged; that the plaintiffs might replace in the hands of the registrar the sum of £20, deposited by the defendant on presenting his petition of rehearing, and repay to Mr. Dimes the amount of taxed costs of the petition incurred by the plaintiffs, which had been paid by Mr. Dimes; that the title of the petition might be amended, as in the notice of motion is mentioned, and then that the petition might be restored to his lordship's paper of rehearings and appeals; and that proper directions might be given, by issuing a commission or otherwise, as might be necessary, for the hearing and determination of the petition of rehearing and appeal before the master of the rolls, assisted by two judges of her majesty's courts of common law at Westminster. The lord chancellor having requested me to hear the motion, and to consider what, if any, order ought to be made upon it, I was attended by counsel, and, having heard the arguments in support of and against the motion, I have considered the case, and have been requested by his lordship to state my opinion thereon in this place. The order sought to be discharged was made by the lord chancellor on a petition

of rehearing of a decree made by the vice chancellor of England, his lordship thereby affirming the decree made by his honor. If his lordship's order were discharged the decree of his honor would remain in full force, and the position of the parties would not be in any material degree altered. It has been stated at the bar, by the counsel of Mr. Dimes, that at present the only object of Mr. Dimes in making the application is to be placed in the same situation in which he was before the lord chancellor's order was pronounced. The application is not made on the ground of any alleged error in his lordship's judgment; counsel on both sides have abstained from making any observations on the merits of the matter in litigation between the parties in the cause. But, as Mr. Dimes desires his petition of rehearing to be restored to the lord chancellor's paper, I must presume that he still alleges error in the decree of the vice chancellor of England; and, by consequence, that the lord chancellor's order affirming that decree is erroneous. But, except in that way, and inferentially, no imputation has been made before me against the order which Mr. Dimes seeks to discharge. It was made after full arguments, and may be perfectly just; but it is contended that the plaintiffs are not entitled to the benefit of the judgment which they have obtained, and that the order ought to be discharged on motion, without a rehearing, or any regard being had to the merits of the case as between the parties. The ground of the application is, that the lord chancellor, at and before the time of the order, was and still is interested in the matters in question in the cause. The suit relates to certain property to which the plaintiffs and the defendant respectively claim to be entitled. The plaintiffs are an incorporated joint-stock company, possessing property and effects to which the proprietors are entitled in shares; and the lord chancellor having been, long before and at the date of the order, proprietor of certain shares in the company, it is alleged by Mr. Dimes, that there is such an interest in the concerns and general property of the company attached to these shares, that the lord chancellor, as owner of them, was and is thereby incapacitated to act as judge in any cause to which the company is a party. It seems scarcely worth while to consider the nature or amount of the interest attached to such shares in a joint-stock company, the value

depending on the market-price of the day, or on the result of the winding-up of the affairs of the Company. He has a strange notion of things who supposes such an interest to be capable of producing any bias in the mind of a judge administering justice in public, and subject to appeal, in a matter having no direct or special relation to the value of such shares. But, on the present occasion, it seems to me more satisfactory to assume, that the interest is such as to make it undesirable at least, if not objectionable, to bring a litigated matter affecting the Company before a judge who has any such interest. The fact of his lordship being the owner of such shares in the Grand Junction Canal Company was, upon the inquiry of Mr. Dimes subsequent to the hearing, communicated to him by the direction of his lordship. Mr. Dimes says, that he was not aware of it at the time he presented his petition of rehearing, or at the time the order was made; and it is not alleged that at the same time the lord chancellor was aware, or in any degree conscious, that he had or could be supposed to have any interest in the matters in question in the cause. Mr. Dimes has not stated any special reason or made any special application for a second rehearing, upon which, Mr. Dimes waiving any objection on the ground of alleged incapacity, the cause might have been reheard for the lord chancellor by other judges; but he insists on a very important principle, from which he says there ought to be no deviation or exception. The application itself is made on grounds which, as they are brought forward, must be considered purely technical, and in a form applicable merely to a technical objection. He alleges no error in the order of which he complains, but he says that the judge was by his interest incapacitated from acting as a judge in the case, and consequently any act done or any order made by him as judge is merely void. The nullity of the order is the sole ground of the application, which must be dealt with in the manner in which Mr. Dimes himself has thought fit to make it. There is no question as to the validity and importance of the general rule, that no one ought to be a judge in his own cause, and that no judge ought, by himself or his deputy, to hear and determine any cause, or make any order, or do any judicial act, in a case in which he has a personal interest. This is a fundamental and most important rule which is

not disputed, and which is not to be departed from without necessity; and in all cases where there are several courts of concurrent jurisdiction, or one court composed of several co-ordinate judges, capable of being held without the presence of any who may happen to be concerned in interest, there is no difficulty in acting on the rule. But, general and important as the rule is, cases may arise in which it must give way to circumstances, and to the necessity of affording a denial of justice. In the case between the parishes of Great Charte and Kensington, the judges said the practice could not overturn so fundamental a rule of justice as that a party interested could not be a judge; but, as to the case of a corporation, and no other justices, it might be allowed, to prevent a failure of justice. A failure of justice was, therefore, in this dictum, considered to be a greater evil than a departure from that fundamental rule, that a party interested cannot be a judge. And where the whole jurisdiction over the matter in question is vested in one judge, where there are no coördinate judges, and where the subordinate judges are, in substance and effect, deputies, whose orders are not complete or final till they are formally sanctioned and adopted by the one only chief judge, cases must arise in which it may be difficult, if not impossible, to act in strict conformity with the rule, without denying justice. Now, the lord chancellor, whatever may be the judicial assistance provided for him by law, is virtually the sole judge of the court of chancery upon bills of complaint addressed to him; and, notwithstanding his position, he cannot be so entirely withdrawn from the affairs, business, and duties of ordinary life as to be altogether exempted from the necessity of suing or being sued in the court of chancery, or exempted from all personal interest in matters which may be litigated in the court of chancery. The cases in which the lord chancellor is a party to the suit are provided for by the established practice of addressing the bill of complaint upon which relief is sought, not to the lord chancellor, as in the usual course, but to the king in his high court of chancery. In such cases the cause may and ought to be heard before the master of the rolls, with or without assistance. The order or decree is made personally, indeed, by the master of the rolls, with his assistants, if any; but it is formally and technically completed, made final, and inrolled as

the decree of the king. Such, I conceive, to be the regular course of proceeding in such cases, although some variances and discrepancies in the form are to be found on the records of the court. But cases in which the lord chancellor is a necessary or proper party do not assist in the determination of the present case, in which the lord chancellor is not so interested as to be a party either necessary or proper to the suit. The bill is not, and I apprehend could not have been, properly addressed to the queen in her court of chancery: it is addressed to the lord chancellor himself. Any order made in the cause by the master of the rolls, or any vice-chancellor, must be subject to be reheard, discharged, or altered by the lord chancellor, and by the lord chancellor alone, and must be adopted and sanctioned by him before it can be, or be deemed to be, a complete and final order of the court of chancery; and consequently, if the lord chancellor cannot, in such a case, fully make any judicial order, or do any judicial act, there must of necessity be a failure of justice in the court of chancery, and many inconveniences would or might happen. The rule, if strictly applied to the extent now contended for, would make it unlawful for the lord chancellor, being a proprietor of Bank of England or East India Stock, or being a trustee of the British Museum, which he is officially, having, in that character, very important duties to perform, to make any order, or do any act, in a case in which the Bank of England, the East India Company, or the British Museum might happen to be parties. Many other analogous cases might very easily be stated, and the objection would not be less, although the subject of the immediate litigation did not directly relate to any thing in which the lord chancellor might be personally concerned or interested, or to any duty which it might be incumbent on him personally to perform, because the general assets or the general conduct of such a corporation or society that I am alluding to may be more or less affected by the result of any litigation whatever in which the corporation or the society may be engaged: and the general assets or the general conduct of the corporation or society being affected, the value of shares, the interest of proprietors, and the particular duties of trustees may be remotely, and consequentially, indeed, but in some degree affected. But interests of this kind do not make it necessary or proper that

all persons possessing them should be made parties to a cause; and in cases where the court of chancery, or, in other words, where the lord chancellor has the sole jurisdiction in the matters brought into litigation, it may be well asked, whether the lord chancellor, even if he wished to do so, could lawfully refuse to hear and adjudicate in such a case of indirect or remote interest. The question does not seem to be so much whether the lord chancellor can lawfully make an order, as whether he can lawfully refuse to make an order when the purposes of justice require it. But, for the purpose of considering how the matter stands in the present case, let it be supposed that the interest imputed to the lord chancellor had been known when the decree of the vice chancellor of England was pronounced against Mr. Dimes, and that Mr. Dimes, being dissatisfied, had desired to appeal. The lord chancellor being, as Mr. Dimes now alleges, incapable of hearing the case, and deciding upon it, Mr. Dimes must have desired to appeal from the decree of the vice chancellor of England to the house of lords; and surely he had a right to do so, and ought to have had the means allowed him to bring any error of which he complained before a perfectly competent and disinterested tribunal. But he could not take his appeal to the house of lords until he had inrolled his decree; and the decree of the vice-chancellor of England could not be inrolled till it had received the signature of the lord chancellor; and, according to the legitimate effect of the argument addressed to me, this signature could not have been lawfully affixed; for, though it was alleged that the act of signature to the docket of the decree was an act merely ministerial, and might, therefore, have been lawfully affixed, though the lord chancellor could not do any judicial act, yet I am of opinion that the signature of the lord chancellor to the decree made by a subordinate judge of the court is not a mere ministerial act. The lord chancellor, having confidence in the decree of his subordinate judge, and in the officer who certifies to him that the proceedings are regular, may, if he thinks fit, in aid of justice, and in order to give parties the means of appealing to the house of lords, at once sign the docket of the decree made by the master of the rolls or the vice chancellor, without applying his mind to the consideration of the merits of the case, or himself investigating the agreement

between the docket and the proceedings or orders of the court. But, in truth, the act is judicial. The lord chancellor may, if he thinks fit, refuse to sign the docket, without first personally satisfying himself that it is right for him to do so. In this stage of the cause, therefore, by the direct argument of Mr. Dimes, the lord chancellor could not have lawfully affixed his signature to the docket of the vice chancellor's decree; the decree could not have been lawfully inrolled; the house of lords could not have lawfully heard the appeal; every step would, according to the argument used in this case, have been a nullity. The lord chancellor, being incapacitated to make any order, could neither reverse the decree of the vice chancellor, nor affix his signature to the docket of the decree, so as to enable Mr. Dimes to appeal to, and procure its reversal in, the house of lords. And supposing the decree of the vice chancellor to have been erroneous, as Mr. Dimes alleges it to be, there must have been, and must now be, by force of his argument, a complete failure of justice in the court of chancery. Nothing less than an act of parliament would have afforded, or could now afford, Mr. Dimes any relief. I am, however, of opinion, that the argument of Mr. Dimes is fallacious, and that the lord chancellor could not have lawfully or properly held himself to be incapacitated to make any order in the cause. I consider the signing of a decree of a subordinate judge by the lord chancellor to be a judicial act; but I am, nevertheless, of opinion, that, if Mr. Dimes had desired it, the lord chancellor not only might, but in the discharge of his duty must, have signed the docket, and thereby enabled Mr. Dimes to go at once to the house of lords, where complete justice might have been satisfactorily done. But Mr. Dimes, in ignorance of the interest which he has since discovered, presented to the lord chancellor an ordinary petition to rehear the cause, on the ground of alleged error in the decree of the vice chancellor. And I will now suppose, that, at the time of the cause being called on for hearing before the lord chancellor, the interest had been discovered and stated, and the objection taken and not waived; and I ask, what could or ought to have been done? The motion, or a part of it, which was abandoned at the hearing before me, asked, that, on the restoration of Mr. Dimes's petition to the lord chancellor's paper of rehearings and appeals,

proper directions might be given, by issuing a commission or otherwise, as might be necessary, for the hearing and determination of the said petition of rehearing and appeal before the master of the rolls, assisted by two judges of her majesty's courts of common law at Westminster. I think that this part of the motion was very properly abandoned, first, because I am of opinion that the lord chancellor has no legal authority to issue any such commission as is suggested; and, secondly, because the undoubted authority of the lord chancellor to require the assistance of the master of the rolls in any judicial matters pending in the court of chancery does not enable him to depute or to vest in the master of the rolls that authority which, by law, is vested in the lord chancellor alone — to reverse, discharge, or alter any decree or order of the vice chancellor of England. It is plain, therefore, that Mr. Dimes has not well considered the nature of his case, nor his course of proceeding, if he had any just ground of complaint: and the course at first suggested by him being now properly abandoned, the question remains, what could or ought to have been done if the interest had been discovered and stated, and the objection taken and not waived, at the hearing? And this is, in effect, precisely the same question as would arise if the present application, to the extent to which it is now pressed, were complied with. Could the lord chancellor have lawfully refused to make an order, or to interfere in any way? It is clear that no order could be made on the petition but by the lord chancellor: no extraneous or foreign assistance, no hearing by other judges, nor any judgment pronounced by them, could make the order any thing but the order of the lord chancellor. In this respect it would be like the case of *Wood* v. *The Corporation of London*, in which an action had been brought, in the name of the mayor and commonalty of London, in the court of the mayor and aldermen. The trial took place before the recorder, in the absence of the mayor; but it was held, that though the mayor absents himself, and the recorder sits for him, it alters not the case; for though the recorder sits personally, and it is personally his judgment, yet it is legally and virtually the act of the mayor. The recorder is his deputy, and his act is the act of his superior. The style of the court is, "before the mayor;" and a man cannot sue either before himself or his deputy. So,

if the lord chancellor were to absent himself, and ask the master of the rolls, with or without assistance, to hear the case, the order made on such hearing, whatever it might be, would legally and virtually be the order of the lord chancellor; and, according to the argument in support of this motion, would be an illegal act and order, and, therefore, absolutely void. Now, no party can have a right to call on a judge to make, and no judge certainly can be obliged to make, an illegal order; and it is, I think, an inevitable consequence and result of the argument of Mr. Dimes, if it were held to be valid, that the lord chancellor ought to refuse to make any order in the cause, though the consequence — the direct and necessary consequence — should be a failure of justice, or rather a denial of justice, to Mr. Dimes himself. What Mr. Dimes now asks would not, in the least degree, relieve him from the difficulty in which he imagines himself to be involved. What he asks is, in effect, this — that the order made to affirm the decree of the vice chancellor of England may be treated as a nullity, for the purpose of restoring the cause to a situation in which there must be either a refusal to make any order, and thereby a denial of justice; or some other order must be made, which, on the same ground as the order already made, ought to be treated as a nullity, again producing to Mr. Dimes a denial of justice. The absurdity of this course of proceeding is manifest, and there is no excuse for it. There need be no denial or failure of justice in this or any like case. It may be admitted, that, in all cases where a strict application of the rule would not lead to a failure of justice, the judge ought not to make an order in a cause in which he is interested. This being so, and it being of the utmost importance to avoid every thing tending to throw even a breath of suspicion on the purity of the administration of justice, I am, nevertheless, of opinion, that, even in a case of imputed interest, the judge is not incapacitated from making the order, if, by refusing to do so, justice would be denied. If the interest had been suggested at the time of the hearing, I presume that the lord chancellor, acting as any other judge would do on the like occasion, would have proposed to the parties to have the case heard before some other judge or judges, by whose opinion or advice his lordship could make such order as should appear right. If both parties had consented to

this, all might have been well. No order could, indeed, have been made free from the objection which Mr. Dimes now insists upon; but there might have been a hearing, for the lord chancellor, before other judges; an order might have been made, in his lordship's name, and with his lordship's sanction, by those other judges; and an enrolment of the order made under the lord chancellor's signature might have enabled either party to appeal ultimately to the house of lords. But, though perfect justice would in this way have been done, and all real and substantial objections entirely removed, it would, according to the argument of Mr. Dimes, have been all entirely wrong, and the whole proceeding would have consisted of a series of nullities. If either party had insisted, as Mr. Dimes now insists, that the lord chancellor was incapacitated from making any order, his lordship would then have had to consider that objection, and to determine what was necessary to be done to prevent a failure of justice; and, bearing in mind that the only object of the present application is to place the cause in the situation I have last supposed, I think that the only real or substantial question to be now considered is, what is required to be done to prevent a failure or denial of justice? It does not appear to me to be necessary to make any remark upon the strange and unqualified assertions sometimes made, even by high authority, upon the incapacity not only of judges and of courts, but even of parliament itself, to do certain supposed acts, in certain supposed cases, and upon the alleged nullity of such supposed acts. I do not concur in the truth of the broad and unqualified assertions which sometimes have been made on these subjects, and which appear to me highly calculated to mislead the unwary: and it is my duty on this occasion to express my own opinion, that there is not and cannot in any case be an incapacity of the judge to make any order or do any act in a matter within the proper, peculiar, and exclusive jurisdiction of his office, if such order or act be necessary to prevent a failure of justice. I think that, whatever the interest of a judge may be, if justice cannot be had without an act or order of his, he cannot lawfully refuse to do the act or make the order required. It appears to me that, in cases where questions of this kind arise, the judge must have and exercise a certain degree of discretion, and that, having the capacity, his duty does not

extend further than the necessity of the case requires. If there are other judges having coördinate jurisdiction, and sufficient in number to make a court without his attendance, he may and ought to retire, and refuse to act at all; but if he, like the lord chancellor, should be the sole and exclusive judge having jurisdiction in the case, it is otherwise; he must do what is incumbent on him to prevent a failure of justice. He is not to disregard the objection to a cause being heard and decided by a judge who has or is even suspected to have an interest in the subject in litigation; neither is he to disregard his first duty to prevent a failure of justice. And, applying these principles to the present case, that of a petition to rehear a cause in which the vice chancellor of England has made a decree, I think that, notwithstanding any alleged incapacity from interest, the lord chancellor might lawfully and properly sign the docket of the vice chancellor's decree, for the purpose of enabling the party to appeal to the house of lords, and might lawfully and properly, if neither party objected, procure the cause to be heard for him by another judge, or other judges, whose disinterested opinion and advice might enable the lord chancellor to make an order substantially his own — a course of proceeding which would not be founded on any supposed incapacity of himself, or of any delegation to any one else of his own peculiar authority to reverse an order of the vice chancellor of England on the hearing. But, if either party should object to this course of proceeding, as it would not be necessary to prevent a denial of justice, I think that, notwithstanding his legal capacity and duty, he might lawfully and properly decline to hear and decide the cause on the merits, or even to commit the hearing to any other or others for the purpose of making an order of his own on the advice and opinion which he might receive. In such a case the party complaining of the vice chancellor's decree could be relieved from any error only by appeal to the house of lords — an ample and sufficient remedy; and if the law were such that the house of lords could not hear an appeal from a decree of the court of chancery which had not been personally pronounced by the lord chancellor himself, on the hearing of the cause, I think that in such a case, which happily does not exist, it would be the duty of the lord chancellor even to hear and make an order on the merits of the case, because

in no other way could a failure of justice be prevented. Having an authority to exercise, and a duty to perform, his discretion in the exercise of his authority, and in the performance of his duty, must be governed by his view of the necessity of the case — the necessity under which he is to prevent his peculiar and personal position occasioning a failure or denial of justice. He is not to abstain because the circumstances may be painful to himself, or such as he would willingly escape from. And, for the reasons I have stated, I am of opinion that an order, which the lord chancellor may make in the exercise of that discretion, is not void for incapacity, and ought not to be treated as a nullity. On the whole, therefore, considering that Mr. Dimes has raised an objection which, if valid, is unavoidable, and leads directly to a denial of justice; that, if the opinion I have stated be correct, it would be the duty of the lord chancellor to enable Mr. Dimes to enrol the decree already made; and, if Mr. Dimes desires it, the order made on the present application, and by that means any error, if error there be, of which Mr. Dimes complains, may be fully and satisfactorily redressed in the house of lords; considering further, that, except by appealing to the house of lords, Mr. Dimes has no means of obtaining relief against the decree of the vice-chancellor, even if the order made by the lord chancellor were discharged; and that granting this application would be of no avail, but would leave the case subject to the same objection and difficulty, from which Mr. Dimes may relieve himself as soon as he pleases by an appeal in the usual course, I am of opinion, and shall humbly advise the lord chancellor, that this motion ought to be refused, with costs.

Recent American Decisions.

Circuit Superior Court of Law and Chancery, Petersburg, Virginia, May Term, 1849.

BENSON *v.* THE COMMONWEALTH.

A "hawker and pedlar" is distinguished from a regular merchant by the *itinerancy* of his employment.

A stranger arrived at Petersburg with carriages for sale, which he placed in the stables attached to a public house, while he solicited offers from persons in the place. After waiting several weeks, he was proved to have said that he should return to Accomac county "if he could not sell," for there he "had sold a good deal of work at higher prices." *Held*, that these circumstances sufficiently established the itinerancy of his employment, to constitute the carriage dealer a "hawker and pedlar."

All those powers which relate merely to *municipal legislation*, or what may more properly be called *internal police*, are not surrendered by the states, nor restrained by the federal constitution; and, consequently, in relation to these, the authority of a state is complete, unqualified, and exclusive.

A general law, requiring all persons, whether citizens of a state or not, to take out a license before they are authorized to sell articles of foreign or domestic growth and manufacture, is an act of municipal legislation, and such an act as the several states are competent to pass.

Nor does a proviso, excepting from the operation of the law the sale of articles manufactured by the vendor *within the commonwealth*, and of provisions and agricultural products, and of groceries and the like brought home by farmers as a return load, exceed the power reserved to the states. Such a proviso is not opposed to the provision of the constitution which declares that "citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states," nor to that which declares that "no state shall, without the consent of congress, lay any duty on imports or exports," nor is it inconsistent with the right vested in Congress "to regulate commerce."

THIS was a writ of error from a judgment of the hustings court for the penalty imposed by the act of assembly for trading as a hawker and pedlar without a license. The alleged offence consisted in the sale of carriages manufactured by the plaintiff in error himself, in the state of Delaware, where he resided, and which were brought by him to Petersburg for sale.

The facts of the case are sufficiently set forth in the opinion of the court.

Joynes, for the plaintiff in error, contended (1.) that inasmuch as the carriages were deposited at a fixed place, where they remained for inspection and sale under an agreement with the proprietor, and that he was a merchant, and no more a hawker and pedlar than if he had put his carriages in a house rented for the purpose for a year or other stated time. *State* v. *Belcher*, (1 McMullan R. 40); 5 Henning's Stat. at Large, 54; Cunningham's Law Dict. tit. "Hawkers and Pedlars." (2.) that the act of assembly, under which the penalty was claimed, was repugnant to the constitution of the United States, and, therefore, void. *Brown* v. *State of Maryland*, (12 Wheat. 419); *Pierce* v. *State of N. Hampshire*, (8 Law Reporter, 215); *People* v. *Huntington*, (4 N. Y. Legal Observer, 187); *Smith* v. *Turner*, and *Norris* v. *Boston*, (1 Law Reporter, N. S. 487); *Campbell* v. *Morris*, (3 H. & McH. 535); *Gib-*

bons v. *Ogden*, (9 Wheat. 198); *New York* v. *Miln*, (11 Peters R. 130); *Groves* v. *Slaughter*, (15 Peters R. 510.)

Wallace, for commonwealth, cited to the point of constitutional law, *New York* v. *Miln*, (11 Peters, 102); *Wynne* v. *Wright*, (1 Dev. & Bat. 19); *Biddle* v. *Commonwealth*, (13 S. & R. 405); *Thurlow* v. *Massachusetts*, (5 Howard, 504.)

NASH, J. The first objection taken to the judgment of the court below is, that the plaintiff in error was not a hawker or a pedlar, according to the legal and statutory meaning of the words. This question, of course, will depend almost wholly upon the testimony in the case. It is readily admitted that a hawker and pedlar is one who carries his goods from place to place, in quest of buyers; and that it is the *itinerancy* of his employment that distinguishes him from the regular merchant, who has a fixed place for his storehouse and the exhibition and sale of his goods. Taking this, then, as the proper definition of a hawker and pedlar, it only remains to see whether the testimony in the case fixes upon him that character. It is proven that on Friday evening, the 21st of April, 1848, Benson arrived in Petersburg with a number of carriages, perhaps seven in number, took lodgings himself at the Bollingbrook Hotel, and obtained permission from the proprietor to place his carriages in the carriage room of the stable; that there was no agreement between them as to any specific length of time, or any definite price agreed on; that he informed Mr. Lea that his carriages were for sale if he had a right to sell them, but he supposed he would have to get out a license. It is also proved that on Saturday morning he went round to the carriage stores in town, and particularly those of Messrs. Harrison & Lea, and offered to sell his carriages which he said were at the Bollingbrook stables; that on Saturday, while at Mr. Lea's carriage store, he met with a gentleman who wanted to buy a buggy, and who, failing to suit himself at Mr. Lea's, was invited by Benson to go down to the Bollingbrook to see one that he had, and which Benson afterwards admitted (on Tuesday,) that he had sold conditionally. It is also proved, that on Saturday, Benson invited Daniel Parkinson, who lived with Mr. Lea, to go down and see his carriages, which he did, and gave the witness his prices for

them; the same witness told him that he thought that he would not be able to sell at his prices; that Benson then said if he could not sell to the carriage-dealers in Petersburg, he should have to take out a license to sell them. It was also proved that on Monday, 24th, he had two of his carriages exhibited on the street in front of the Bollingbrook stables, and further, that on the same day he sold to J. H. Nichols a carriage, (which the witness says was a second hand one,) for which Nichols paid in another carriage and the difference in money. It is also proved that Benson told Mr. Lea, on Sunday, that if he could not sell that he meant to carry his carriages back, and said he would carry them to Accomack county, Va., and the contiguous section of country, where he had sold a good deal of work at higher prices. From this testimony it is manifestly to be inferred that Benson was an itinerant dealer in carriages; that he came to Petersburg and brought with him his wares in quest of a market; that he took no permanent lodgings for himself, or rented or otherwise obtained any permanent place of deposit for his goods, but that they were to be moved about with himself, and offered for sale wherever he could find a purchaser; that, from the nature of the articles, they could not be carried about in a pack upon his back, or in a cart, but were to be left temporarily at the Bollingbrook stables, while he himself travelled about in quest of purchasers. This course of proceeding and dealing is believed by the court to impress upon him the distinctive character of an *itinerant* dealer in carriages, or, in other words, of a hawker and pedlar, within the meaning of the act of the general assembly in such cases made and provided.

The second question is one of a much graver and more important character. It is a question whether the act of the general assembly, passed March the 3d, 1840, in relation to merchants' licenses and licenses to hawkers and pedlars, with the proviso contained in the second section of the act, is a violation of the provisions of the federal constitution or not.

By the 1st section of the act, it is declared,

"That it shall not be lawful *for any person* to sell goods, wares, and merchandise of *foreign or domestic growth, production or manufacture* within this commonwealth, unless he shall have paid the tax regulated by law, and obtained a license," &c.

By the 2d section, which is in the nature of a proviso, it is said,

"Provided that nothing herein contained, shall be so construed as to prevent any person from disposing of any goods, wares, or merchandise, or other articles of his own manufacture within this commonwealth, nor to prevent any person from repairing watches or other things, and thereby vending such materials as are used by him in the operation, &c. or to prevent the selling of provisions, or agricultural products, whether of this or any other state, nor to prevent farmers from selling salt, iron, and steel, molasses, spices, gypsum, &c. to his neighbors, when brought back as a return load," &c.

This act, and the proviso, it is contended, prohibits the sale in Virginia, by a citizen of another state, of articles manufactured by him in another state without a license here, while it permits the manufacturer of articles made in the state of Virginia to sell the same without a license; and this is said to be a violation of that provision of the federal constitution which declares that "citizens of each state, shall be entitled to all the privileges and immunities of citizens of the several states." And it is also alleged to be in violation of two other provisions of the constitution, namely, that which declares that "no state shall, without the consent of congress, lay any duty on imports or exports, except what may be absolutely necessary for executing its inspection laws," and also, that other provision, which declares that "congress shall have power to regulate commerce with foreign nations, and among the several states," &c. In considering the question arising in this case, and all others of a kindred character, which involve an inquiry into the extent of the legislative power of the states, it is first proper, that we settle correctly in our own minds, the relation which the states of this union bear to the federal government, so far as the power of legislation is concerned; and I cannot better express my own views upon this subject, than by adopting the language of the supreme court of the United States, as expressed by Mr. Justice Barbour, in the case of the *State of New York* v. *Miln*, reported in 11 Peters, 102. The court there say,

"That a state has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits, as any foreign nation, when that jurisdiction is not surrendered or restrained by the constitution of the United States; that by virtue of this, it is not only the right, but the solemn duty of the state to advance the happiness, the safety and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem conducive to these ends, where the power over the particular subject, or the manner of its exercise, is not surrendered or restrained in the manner first stated; that all those powers which relate merely to *municipal legislation*, or what may be more properly called *internal police*, are not thus surrendered, or restrained, and that consequently in relation to these, the authority of a state is complete, unqualified, and exclusive."

Let us then inquire what is the character of the act of the legislature which we are now considering. It is a general law, requiring all persons, whether citizens of the state or not, to take out a license, before they are at liberty to sell articles of foreign or domestic growth and manufacture. It is a privilege, extended alike to citizens of our own state, as well as to citizens of other states; and applicable alike to foreign and domestic manufactures. But it is said, that the proviso which exempts from the operation of this general license law, persons who may sell articles, the produce of their own industry, and farmers who bring back return loads of groceries, &c. renders this part of the act obnoxious to the objection, of violating that provision of the federal constitution which secures to "the citizens of each state, all the privileges and immunities of citizens of the several states," because a citizen of another state cannot bring the articles of his own manufacture here, and sell them without a license. This objection cannot certainly be maintained. The true meaning of that provision of the constitution is, that citizens of each state, shall be entitled when they come into our state, to all the privileges and immunities of our own citizens under like circumstances, and engaged in like pursuits. The law in question, is one of a general character, and applicable alike to citizens of Virginia, as well as to citizens of other states who may come here and settle among us, and engage in similar pursuits with our own citizens, and is equally applicable to articles of foreign growth and manufacture, as to domestic articles; and is in truth, only a tax on the trade and business of merchandising, or the privilege of carrying on the business of a merchant; while the exception is intended to exclude from the character of merchant, persons who may sell the fruits of their own industry, or groceries brought back by farmers as a return load for their wagons going to market. It is an exemption in favor of a meritorious class among our own citizens as well as the citizens of other states who may settle within our borders, and engage in similar pursuits with our own citizens.

The other objection, that it is a violation of the other provisions of the federal constitution above referred to, is also believed to be untenable. It is often a matter of difficulty to draw the precise line, which separates the power of congress to regulate commerce among the states, from the general power of

each state to pass all laws pertaining to their own municipal legislation, or what may more properly be called its internal police. Questions of this kind have frequently of late, occupied a large share of the attention of the supreme court of the United States; upon which we find a singular diversity of opinion among the judges. I am myself of the opinion, that congress has the power "to prescribe the subjects of importation, and the mode and manner of their introduction into the country, and when that is done the power of congress is spent, and the article introduced must take its chance with all the other property of the state in finding a market," and be in like manner subject to all the municipal regulations, whether for the purposes of taxation or police, provided that such municipal legislation, by which the mode and manner of putting the articles into market, and regulating their sale, are in truth and in fact what they purport to be, police regulations for the orderly sale of the goods, and are not such enactments as directly conflict with, or are repugnant to, the power of congress to regulate the introduction of the article into the state. That such municipal regulations may *incidentally*, or to a limited extent, interfere with the importation of the article, is not a sufficient and valid objection; it must be such an interference, as would defeat the power of congress. It is upon this principle alone, that many of the most important acts of state legislation of acknowledged validity, must depend; and which is a principle, acknowledged by all the ablest jurists and commentators upon the powers of the federal and state governments. Believing then, that the act in question, is a mere municipal regulation, requiring all persons engaged in carrying on the business of a merchant, or that of hawker and pedlar, first to obtain a license for the more orderly and correct management of their business, as well as a tax upon the privilege, I can see nothing in its enactments, or its effects, which will defeat the power of congress to regulate commerce among the states or that partakes of the character of a duty on imports. The judgment of the court therefore is, that the judgment of the Hustings court of Petersburg be affirmed.

Notices of New Books.

THE JURISDICTION, LAW, AND PRACTICE OF THE COURTS OF THE UNITED STATES IN ADMIRALTY AND MARITIME CAUSES, INCLUDING THOSE OF QUASI ADMIRALTY JURISDICTION, ARISING UNDER THE ACT OF FEBRUARY 26, 1845. With an Appendix, containing the new Rules of Admiralty Practice, prescribed by the Supreme Court of the United States, with numerous Practical Forms, &c. By ALFRED CONKLING, Judge of the United States for the Northern District of New York. Albany: W. C. Little & Co. Law Booksellers, 53 State Street. Boston: Charles C. Little and James Brown, 112 Washington Street. 1848.

WE owe an apology to the author and publishers of this work for our long delay in noticing it. We are, however, gratified to learn that its success has already rendered recommendations unnecessary, and that it is enjoying, as it should, the confidence of the profession.

The author remarks, in his preface, that the design of the work is "not to supersede other works, but to supply a want." This is well said, for with the exception of Mr. Dunlap's treatise, which is entirely out of print, we have no American work on Admiralty practice. Besides this, the passage of a recent act of congress, (act of February 26th, 1845,) "extending the jurisdiction of the district courts to certain cases upon the lakes and navigable waters connecting the same," has created a new state of things upon our inland seas, which will soon require the careful attention of the profession. To some extent, the matter has already been well considered; but not only do the peculiarities of the new system of admiralty in the West create some embarrassment, but the lawyers in the western country generally having been trained exclusively to a system of common law proceeding, inherit, by just right, the jealousy of Lord Coke. It is in view of all these considerations, that we are glad to welcome the work of an inland judge, who approaches his subject with a liberality which those "within the ebb and flow of the tide," had unreasonably supposed to be peculiar to themselves.

The act of congress, to which we have referred, gives to the district courts of the inland states the same jurisdiction, "in matters of contract and tort, arising in, upon, or concerning steamboats and other vessels of twenty tons burden and upwards, enrolled and licensed for the coasting trade, and at the time employed in business of commerce and navigation between ports and places in different states and territories upon the lakes and navigable waters connecting the said lakes," as is now possessed and exercised by the admiralty courts of the maritime states. The necessity for such an act has been but recently suggested by the rapidly expanding commerce of the great West. For many of the purposes to which it is

applicable, it is conceded that the peculiar remedies of the admiralty process are far more expeditious and effectual than those of the common law. But it was not altogether practicable to extend the admiralty jurisdiction of the eastern states westward. A constitutional obstacle intervened, which could only be overcome by securing to the parties a jury trial, — a practice somewhat anomalous. The great obstacle, however, we have already mentioned. It grew out of the habits of the people and the education of the lawyers, and it was this peculiar state of things which suggested Judge Conkling's work.

His treatise is perspicuously arranged, full, complete, and accurate. The first part, on jurisdiction, treats in successive chapters of the extent of the admiralty jurisdiction; — claims of material-men; — mariners' wages; — contracts of affreightment; — bottomry and respondentia bonds; — pilotage; — wharfage; — agreements of consortship; — survey and sale of ships; — dispute between part owners; — possessory and petitory suits; — salvage; — collision; — assaults, beating false imprisonment, &c.; — spoliation and damage. The second part is on practice; and this is the most interesting and valuable part of the work. It is thoroughly digested, the authorities well collated, and the rules of practice clearly set forth. Besides this, the author has prepared, with great care, a collection of forms or precedents This supplies a great defect. Indeed, as the author says, with the exception of precedents for the libel and answer, no such collection, pertaining to actions in the admiralty has hitherto appeared in this country, and the English publications hardly deserve the name.

We had a little idea, at the outset, of breaking a lance with the learned author of the present treatise, for his note on page 399, but it seems unnecessary at this time to renew an old controversy; and we therefore dismiss the whole subject, simply regretting that as he published the first article, and the first reply, he could not have done us the justice of publishing also a second article in answer to the "anonymous" reply. Our readers will excuse us for these blind allusions, for they must have been long ago tired by the skirmish to which they refer. We are gratified, however, to learn that the learned author fully concurs with us as to the defects and gross injustice of the act of March 3d, 1847, an act, the glory of whose passage, is divided between the New York Herald and a few ship-owners of that city, fanatically opposed to sailor lawyers. The learned judge of the district court of Maine has also exposed (*Skolfield* v. *Potter*, 2 Law Rep. N. S. 121,) the mischievous operation of that law, and it is earnestly to be hoped that some influence more salutary than that which effected its passage may soon secure its repeal.

A Treatise on the Pleadings in Suits in the Court of Chancery, by English Bill. By John Mitford, Esq., (The Late Lord Redesdale.) Comprising the Notes of George Jeremy, Esq., of Lincoln's Inn, Barrister at Law, Charles Edwards, Esq., Counsellor at Law, New York, and a large body of additional notes, by Josiah W. Smith, B. C. L., of Lincoln's Inn, Barrister at Law, Editor of Fearne on Remainders, and author of a treatise on Executory Interest. Sixth

American, from the fifth London Edition, with copious American Notes, by Joseph W. Moulton, Esq., Counsellor at Law, New York. New York: John S. Voorhies, Law Bookseller and Publisher. Philadelphia: T. & J. W. Johnson, 1849.

The treatise of Lord Redesdale, on equity pleadings, is admitted, both in England and America, to possess peculiar excellence. In the former country it is received as an authoritative standard and guide by the whole profession, and although to some extent it is made up of *opinions* merely, yet upon all matters of equity pleadings, in both countries, the opinion of Lord Redesdale "is always esteemed the highest authority." *Bogardus* v. *Trin. Church*, (4 Paige's R. 195.)

To this valuable treatise, already improved by successive English annotations, the American editor has added a most valuable collection of notes, which by Americanizing the work, have materially increased its value.

Reports of Cases in Law and Equity in the Supreme Court of the State of New York. By Oliver L. Barbour, Counsellor at Law. Vol. III. Albany: Gould, Banks & Gould, 104 State Street. New York: Banks, Gould & Co., 144 Nassau Street. 1849.

This is the third volume of a new series of reports; and is valuable, like its predecessors, for its accuracy and compactness. We have noted several cases which we hope to find time and space to allude to more fully.

A Practical Treatise on the Law of Sheriff and Coroner, with Forms and References to the Statutes of Ohio, Indiana, and Kentucky. By A. E. Gwynne, Attorney at Law. Cincinnati: H. W. Derby, & Co., Publishers. 1849.

This work, as appears by its title, is evidently intended for the western states; yet although more particularly adapted to that part of the country, it is not without value elsewhere. It has been prepared with great labor, and treats of a branch of the law which is very intricate and embarrassing.

Reports of Cases Argued and Determined in the Court of Chancery of the State of New York. By Oliver L. Barbour, Counsellor at Law. Vol. III. New York: Banks, Gould, & Co., 144 Nassau Street. Albany: Gould, Banks & Gould, 104 State Street. 1849.

The new constitution of the "empire state," abolished its court of chancery and supreme court, from and after the first day of January, 1847; but reserved to the chancellor and justice of the supreme court, respectively, power to hear and determine such suits and proceedings as should be ready for hearing on that day. A compensation was provided until July 1, 1848, at which time the chancellor retired from the bench, leaving but eight cases undecided. The members of the bar took advantage of this opportunity to pass resolutions, in the highest degree complimentary, expressing their appreciation of the judicial course of Chancellor Walworth.

And thus terminated the court of chancery, a court honored by its association with the names of Livingston and Kent, and whose salutary influ-

ence through a long series of years has been admitted everywhere. It is gratifying to consider that although its form is gone, yet the spirit of equity jurisprudence still pervades the whole judicial organization of New York.

Thus much for judicial history. We are not informed by the reporter whether the present volume is to be the last of the series, but we infer that it will, as it contains some cases decided as late as June 30th, 1848. We regret to think so, for the reports of Mr. Barbour, both in law and equity, sustain a high rank in legal bibliography. The hasty examination which we have given to the one in hand, satisfies us that it is in no wise inferior to its predecessors, and we cheerfully recommend it to the confidence of the profession.

Miscellaneous Intelligence.

ADMIRALTY PRACTICE. — One of our subscribers from the south-west, a gentleman of learning and liberality, complains that we are too fond of the admiralty, that we give up too much room to admiralty cases. Well, we are sorry we cannot please everybody; and we shall try to hunt up some cases more interesting to our inland friends. Nevertheless, we are not sure that gentlemen of the interior even, are so much opposed to admiralty. We were very much gratified to find our report of the case of *The Taranto* and the accompanying article copied approvingly by the Western Law Journal.

SERGEANT TALFOURD. — Mr. Sergeant Talfourd has been appointed one of the justices in the court of common pleas, England, in place of the late Mr. Justice Coltman. When the official announcement was received from the lord chancellor, much satisfaction was evinced by the barristers of the Oxford circuit, who congratulated their eloquent and amiable leader on his new dignity. The judge elect, who returned his briefs and fees in several cases, proceeded to town to be at once sworn in, that he might attend chambers, lord chief justice Denman being ill.

PARDONS. — The legislature of Virginia have so far modified the pardoning power of the executive, that the governor cannot pardon a convicted person, because the sentence is contrary to law, or evidence; although he may if the criminal be recommended to mercy by the court or jury, or if new facts are disclosed after trial, and he may always *reprieve* until the next session of the legislature.

COURTS MARTIAL. — A recent case in England (*case of Captain Douglass*) has revealed to gentlemen of this military and legal profession, the defects of courts martial. The United Service Journal says; "In civil courts it is a maxim, justified by every day's experience, that the man who is his own lawyer has a fool for his client. Military courts would practically enforce an opposite doctrine."

Obituary Notices.

Died, at Portland, Friday, Aug. 3, Hon. Stephen Longfellow, aged 73. Our respected fellow-citizen, whose lamented death we record, was for many years at the head of the Cumberland bar; and after the removal of Chief Justice Mellen to the supreme court, in 1820, and Chief Justice Whitman, in 1822, to the common pleas, the able and successful leader in the practice there. He was born in Gorham, March 23, 1776, to which place his father and grandfather, both of the same name with himself, moved, after the destruction of Portland, in October, 1775. He entered Harvard College at the age of eighteen, and passed through his studies there with faithfulness, earning the reputation of a good scholar, and as one of his classmates recently told us, taking a high position, both with his fellow-students and the government, for integrity of purpose, sound judgment, and amiableness of deportment, traits which he carried through life. He took his degree in 1798, by the side of Dr. Channing, Judge Story, Sidney Willard, Dr. Tuckerman, and other distinguished persons, of whom, in a class of forty-eight, but seventeen are now living. He immediately entered on the study of law, with Salmon Chase, was admitted to practise at the Cumberland bar in 1801, and established himself at Portland. There were but eight lawyers in the county, six of whom were in Portland, namely: John Frothingham, Daniel Davis, William Symmes, Salmon Chase, James D. Hopkins, and George E. Vaughan; the other two, were Ezekiel Whitman, of New Gloucester, and Peter O. Alden, of Brunswick, all of whom are long since dead, except Judge Whitman, who is of the same age as Mr. Longfellow, and now happily in the full enjoyment of life and health among us.

Davis, Symmes, Chase, and Hopkins, were in full practice at this time, and were ingenious and skilful advocates, and able competitors; but Mr. Longfellow threw himself fearlessly into their midst, and by his firmness and integrity of principle, his patient industry, his intelligence, perseverance, fidelity to his clients, and urbanity to all, soon secured a most successful practice, the best in the county, which never left him, until its accumulating weight broke down the colossal power which had sustained it. His mind, taxed to the utmost for a long series of years, by a constant pressure of engagements, in the most important cases litigated in our courts, at length gave way, and he became for the last fifteen years subject to fits of epilepsy, which gradually enfeebled his mind and compelled him to withdraw, though slowly and reluctantly, from a profession which he had amply honored, and in which he had won the fairest laurels.

No man among us more surely gained the confidence of all who knew him, or held it faster; none knew him but to love; and while firm for truth and inflexible in the cause of justice, he never forgot the duties of a gentleman and a christian; he never lost suavity of manner in the fortitude of action.

> "Cui Pudor et Justitiæ soror
> Incorrupta Fides, nudaque Veritas,
> Quando ullum inveniet parem?"

In 1814, being then a representative to the general court from Portland, he was chosen a member of the Hartford Convention, with Judge Wilde, then residing in Maine, and other federalists of the old school, some of the most distinguished gentlemen and statesmen in New England. In 1822, he was elected a member of congress; but he was not fond of political life; he was devoted to his profession with the passion of a first love, and there sought and found his fame, the perpetual record of which remains in the first sixteen volumes of the Massachusetts Reports, and the first twelve volumes of the Maine Reports, extending over a period of thirty years. During this time, we find him engaged on one side or the other of almost every case of importance. In 1828, he received from Bowdoin College the well-deserved degree of doctor of laws.

Mr. Longfellow had a remarkably well-balanced mind, and brought to the consideration of every case a calm and sound judgment. His addresses to the jury were never brilliant or impassioned, but carried great weight to their minds, by clear statement, an ingenious exhibition of the strong points, and an irresistible honesty and candor of manner. The jury always felt that he had the right side of the cause, or, at least, that he believed he had. No lawyer at the bar had so much influence with them during the best days of his practice as he had; and it required all the skill and earnestness of Mellen, all the solid gravity of Whitman, the ardor and ingenuity of Orr, the polished keenness of Greenleaf, and the ponderous blows of the elder Fessenden, to counteract the subtle influence of Longfellow's adroit appeals to this tribunal.

His arguments to the court were characterized by thoroughness, discrimination, and a careful elimination of what was unsound or immaterial; he was never verbose, never feeble, and a case might well be considered exhausted, on the side of his argument, when he dismissed it from his hands.

In his domestic relations, Mr. Longfellow was as much distinguished as in his public services. In January, 1804, he married Zilphah, a daughter of General Wadsworth, with whom he lived in uninterrupted happiness for more than forty-five years, and by whom he had eight children, four sons and four daughters, some of whom are not unknown to fame, and of whom the four sons and two daughters, with their mother, still survive. In all the relations of private life, Mr. Longfellow was a model man; kind and affectionate in his family, uniformly courteous to all, ready with his services and money, whenever they were required, or a good work was to be done; he was for more than forty years an efficient officer in the Portland Benevolent Society, and many years an exemplary member of the first church. A life so adorned with good deeds, and filled with useful services, cannot have been spent in vain, and cannot be withdrawn from worldly observation, without a shock to the community which has been blessed by it. On taking leave of him, we but express the universal sentiment, that an able, upright, honest, and christian gentleman has gone, the like of whom we never may again look upon; and of whom we may say, as was said of an eminent English lawyer, "he has cast honor upon his honorable profession; and has sought dignity not from the ermine and the mace, but from a straight path and a spotless life."

A special meeting of the bar of Cumberland county was called, on occasion of his death, at which the Hon. Samuel Fessenden presided, and which was attended by Chief Justice Whitman, Judges Emery, Wells, and Howard, of the supreme court, and Judge Ware, of the United States court, and numerous members. Resolutions were passed, expressive of the high sense entertained of the deceased, as a lawyer, a man, and a christian, and of the deep sympathy they felt for his bereaved family. They also attended in a body, at his funeral, to bestow upon one they loved and admired, the last token of respect. He was buried on Sunday, the fifth day of August.

W.

At New York, July 15, Hon. DAVID B. OGDEN, aged 80. Mr. Ogden was one of the most distinguished lawyers in the United States. He had been for more than fifty years a prominent member of the bar of the city of New York. In the courts of his own state, and in the supreme court of the United States, he was frequently brought into competition with the leading intellects of the nation, and always sustained himself with honor and success. He occasionally mingled in political affairs, but he had no taste for their labors or rewards. For the last fifteen years, he was not engaged in the active duties of his profession, confining himself to private consultations, and to his duties, as one of the counsel of Trinity Church. It is needless to add more. His reputation was a national one, and no feeble words of ours can exalt it. The proceedings of his brethren of the bar, in which several of the most eminent lawyers of the city took part, are an honorable tribute to his memory. As such, we publish them. The report is taken from the Evening Post.

A meeting of the members of the bar was held in the room of the supreme court, to express their respect for the memory of the late David B. Ogden.

Gerardus Clark, Esq., called the meeting to order, and nominated Hon. Samuel Jones to the chair. Ogden Edwards, F. J. Oakley, J. W. Edmonds, —— Strong, and W. T. McCoun, Esqs., were nominated vice-presidents, and J. L. Lawrence, William Kent, T. L. Wells, and W. H. Harrison, Esqs., secretaries. Justice Jones then announced the object of the meeting, and remarked, with great feeling, that with the deceased were connected some of his earliest recollections; with him he had prepared for his collegiate course. "It was with him I most associated while attending the same grammar-school; and it was his voice that I last heard in the line of his professional duty, in one of the ablest arguments that it has been my privilege to hear. But he is now gone from among us."

H. Ketchum, Esq., then arose to present a series of resolutions, which he prefaced with some remarks, in which he paid a warm and deserved tribute to the memory of the deceased.

He regretted that one older and more familiar with the early history of the deceased, had not been selected for the duty. His earliest recollection ran not back to the time when Mr. Ogden did not occupy the first rank in his profession. The deceased was one of the few old representatives of the bar of this city, and he rejoiced that there was here and there one of those old counsellors yet remaining, and may the day be very far distant when they shall all have departed.

David B. Ogden early stood before the bar as no unworthy competitor of Hoffman, of Emmet, Harrison, Williams, Hamilton. Where are they? Nothing now remains of them but the memory of their distinguished abilities, their burning eloquence, and their personal virtues.

David B. Ogden was a man of peculiar simplicity of manners; opposed to every thing like display or pretension. His intellect, like his form, was majestic; but was clothed with simplicity. His disposition was amiable and kind. To his professional brethren he was kind and open-hearted In his domestic arrangements he was indulgent almost to weakness; but he was faithful to his duty. Had he been as faithful to his own interests, he would not have been compelled to labor at times, both in winter's cold and summer's heat, almost to the last day of his life. Mr Ogden was remarkable for the brevity of his statement and the conclusiveness of his arguments. No man ever received greater tributes to his talents than he did. He was a favorite of Chief Justice Marshall.

This is a very meagre outline of his professional career. He is known to us as a patriot. He was utterly opposed to demagogueism. More than all, like Kent, Marshall, Thompson, and Spencer, he was a believer in the christian religion, and a disciple of the cross. He deemed it no dishonor to worship at the family altar and commune at the church. But, sir, he is gone, and may it be our aim to follow his example and copy his virtues.

Mr. Ketchum then read the following resolutions, which were seconded by Mr. Tillou:

Resolved, That the New York bar has heard with deep sensibility of the decease of its distinguished ornament, David B. Ogden, the venerable citizen, the profound lawyer, the warm-hearted friend, and the devoted christian.

Resolved, That throughout a long professional career our lamented friend has set a bright example to his professional brethren of all those virtues which give dignity to their profession, and respectability to its members.

Resolved, That in this afflicting dispensation of Providence, our city, state, and country, are called upon to mourn the loss of one whose fame was coextensive with our union, and whose departure from among us will leave a melancholy void, not only in the domestic circle, but in all those relations which identify a good man, an able jurist, a disinterested patriot, with the age in which he lives.

Resolved, That the bar of New York most cordially sympathize with the family of the deceased, in their afflicting bereavement, and that as a tribute of respect to the memory of our revered friend, we will wear the usual badge of mourning for thirty days.

Resolved, That the bar will attend the funeral service of their deceased brother, at Trinity Church, at twelve o'clock, M.

Resolved, That the proceedings of the meeting be published, and that a copy of the resolutions, signed by the officers of this meeting, be transmitted to the family of the deceased.

At Albany, July 19, Hon. HARMANUS BLEECKER, aged 70.

Mr. Bleecker belonged to one of the oldest Dutch families, being a descendant of the celebrated John Jansen Bleecker, the head of the Bleecker family in the state of New York. He was the son of Jacob Bleecker, a most respected merchant of Albany. After receiving a classical education, Mr. Bleecker commenced the study of the law with John V. Henry, Esq., and was admitted to practise at the bar in 1801, in the twenty-second year of his age. He afterwards formed a professional copartnership with Theodore Sedgwick, Esq., which connection continued for many years.

In 1810, Mr. Bleecker was chosen to congress from the city of Albany. And as a striking proof of the confidence entertained toward Mr. Bleecker by all political parties, it may be added, that he was offered the post of adjutant-general, by Governor Clinton, to whom he had been actively opposed for many years. The office was declined, although the magnanimity which dictated the proposal was fully appreciated. Afterwards, Mr. Bleecker was appointed by President Van Buren, another political opponent, to be the American chargé d'affaires at the Hague. Upon leaving Holland, after performing the duties of his mission, Mr. Bleecker was honored by an official expression of regret, a compliment as flattering as it was unprecedented. Mr. Bleecker was a most high-minded and refined gentleman, an upright lawyer, a public-spirited citizen, and a generous friend.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Bliss, Joel H.	Chicopee,	July 30,	George B. Morris.
Broad, Lewis, et al.	Ashland,	" 12,	Henry Chapin.
Barstow, John,	Rochester,	" 7,	Welcome Young.
Beckett, Joseph L. et al.	Lawrence,	" 25,	John G. King.
Carpenter, Timothy,	Braintree,	" 14,	Francis Hilliard.
Crane, James,	Salem,	" 21,	John G. King.
Clapp, Zebulon,	Lowell,	" 11,	Asa F. Lawrence.
Curtis, Josiah,	Lowell,	" 4,	Asa F. Lawrence.
Clark, Samuel, et al	Worcester,	" 18,	Henry Chapin.
Clark, Abijah S.	Hubbardston,	" 28,	Henry Chapin.
Carver, Reuben,	Boston,	" 20,	J. M. Williams.
Davis, Timothy,	Gloucester,	" 14,	John G. King
Drury, Joel E.	Wendell,	" 31,	D. W. Alvord.
Fuller, Edwin et al.	Framingham,	" 12,	Henry Chapin.
Harding, Thomas, jr. et al.	Lawrence,	" 25,	John G. King.
Hood, Hiram D.	Salem,	" 9,	John G. King.
Howard, Amos, jr.	Oakham,	" 7,	John G. King.
Howe, Winthrop,	Millbury,	" 25,	Henry Chapin.
Howe, William,	New Bedford,	" 18,	D. Perkins.
Kingsley, Eben W.	Greenfield,	" 12,	D. W. Alvord.
Lock, William,	Rochester,	" 3,	Welcome Young.
Mann, Barnabas N. et al.	Boston,	" 23,	J. M. Williams.
Maxwell, George F. et al.	Boston,	" 19,	J. M. Williams.
Miles, George P.	Boston,	" 11,	J. M. Williams.
Page, Edward,	Leominster,	" 14,	Henry Chapin.
Phelps, Franklin F. et al.	Worcester,	" 18,	Henry Chapin.
Samuels, Emanuel,	Milton,	" 27,	Francis Hilliard.
Sanborn, Nathaniel P.	Marblehead,	" 28,	John G. King.
Shepard, Isaac F.	Somerville,	" 10,	Asa F. Lawrence.
Smith, Sylvander A.	Ware,	" 21,	Myron Lawrence.
Stearns, Samuel,	Greenfield,	" 28,	D. W. Alvord.
Stoddard, William, et al.	Boston,	" 19,	J. M. Williams.
Thayer, Bezer, et al.	Boston,	" 23,	J. M. Williams.
Walker, Charles,	Dorchester,	" 14,	Francis Hilliard.
Walker, Ebenezer B. et al.	Oxford,	" 12,	Henry Chapin.
White, William H.	New Salem,	" 13,	D. W. Alvord.
Winchel, Hector,	Lanesboro'	" 11,	T. Robinson.